



### **Focus: European Public Prosecutor**

**Dossier particulier: Procureur européen**

**Schwerpunktthema: Europäische Staatsanwaltschaft**

The Initiative for a Directive on the Protection of the  
EU Financial Interests by Substantive Criminal Law

*Dr. Lothar Kuhl*

A Decentralised European Public Prosecutor's Office  
Contradiction in Terms or Highly Workable Solution?

*Dr. Simone White*

L'Espace judiciaire pénal européen : une vision se concrétise

*Francesco de Angelis*

Naming and Shaping. The Changing Structure of Actors Involved  
in the Protection of EU Finances

*Dr. András Csúri*

From Europol to Eurojust – towards a European Public Prosecutor

Where Does OLAF Fit In?

*Valentina Covolo*

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### Imprint

\* News contain internet links referring to more detailed information. These links can be easily accessed either by clicking on the respective ID-number of the desired link in the online-journal or – for print version readers – by accessing our webpage [www.mpicc.de/eucrim/search.php](http://www.mpicc.de/eucrim/search.php) and then entering the ID-number of the link in the search form.

# Guest Editorial

Dear Readers,

In 1997, a group of researchers called upon by the European Commission presented guidelines for the improvement of the criminal law protection of the financial interests of the European Union. In addition to proposals for substantive-legal models, the draft – which was published in its final version as “Corpus Juris” in 2000 – contained a proposal for the establishment of an independent and decentrally organised European Public Prosecutor.

As a member of the above-mentioned research group, I was glad to witness the shift from initial scepticism and widespread criticism of this bold and progressive idea by representatives of the legal and political communities to acceptance in principle. In 2001, with the assent of the European Parliament, the initiative was adopted in the Green Paper on the criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor. It was to be promulgated as the new Art. 280a in the EC Treaty; ultimately, it found its way into the Treaty of Lisbon after the Constitution for Europe had failed. Art. 86 TFEU provides for the setting up of a European Public Prosecutor by a unanimous decision of the Council after the assent of the European Parliament. It also, however, allows for the initiative of a group of at least nine Member States to seek a Council decision for their region.

For over a decade, a lively debate has taken place on the possible creation of a European Public Prosecutor. The debate was sparked by two studies of the Max Planck Institute for Foreign and International Law in Freiburg/Germany and a project carried out by the University of Luxembourg, in which a code of model procedural rules for the European Public Prosecutor was developed.

The comprehensive and controversial discussions on this subject document the longstanding opinion that the introduction of new institutions into “dynamic” procedural law, which deals with a multitude of conflicting interests and constitutes a complicated system, would cause greater problems than a harmonisation or statutory redefinition of criminal offences in the somewhat “rigid” substantive law given to selective amendments as we know it.

So far, a basic consensus seems to have been reached on the concepts regarding the protection afforded by the law („juge des libertés“) and the inadmissibility of evidence, and they should be implemented in the Council Regulation on the establishment of a European Public Prosecutor according to Art. 86(3) TFEU. Aside from the general question of how the European Public Prosecutor should be organised, two issues remain a matter of political controversy: how to regulate the rights of defence, which are not set out in the TFEU, and how to avert the danger of “forum shopping,” i.e., the possibility for the European Public Prosecutor to choose a jurisdiction having the laws most favourable for criminal prosecution. Even in this respect, feasible solutions exist. The best and simplest solution would be to lay down the criteria for the choice of jurisdiction under Community law as well as the coercive procedural measures and their prerequisites in a Council regulation according to the suggestion of the Corpus Juris. The Luxembourg pilot project envisages a supranational regulation of all powers of intervention but prefers to divide the legal protection between the „juge des libertés“ and the European Court of Justice.

Ultimately, the ambitious and complex undertaking of establishing a European Public Prosecutor is in line with supranational criminal policy to date. It is anticipated that, in the near future, the Commission will make an expedient recommendation or present a White Paper, possibly already in connection with the recent publication of a draft directive on the criminal law protection of the financial interests of the European Union.

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## European Union\*

Reported by Dr. Els De Busser (EDB), Cornelia Riehle (CR) and Claudia Kurpjuweit (CK)

### Foundations

#### Enlargement of the EU

##### Re-Energised Accession Talks for Turkey

On 17 May 2012, the Commissioner for Enlargement and European Neighbourhood Policy, Štefan Füle, and the Turkish Minister for European Affairs, Ege-men Bağış, launched a new agenda for Turkey's accession negotiations. The so-called positive agenda includes aspects such as the alignment with EU legislation, political reforms and fundamental rights, visa, mobility and migration, trade, energy, counter-terrorism, and dialogue on foreign policy. In order to proceed with these agenda points, working groups will be set up that will be responsible for accelerating the process of aligning Turkey with EU policies and standards under eight chapters. (EDB)

► eucrim ID=1202001

##### Progress for Serbia and Bosnia and Herzegovina

During the meeting of 1-2 March 2012, the European Council agreed to grant

Serbia the status of candidate country to the EU (see eucrim 1/2012, p. 3). On 21 March, Commissioner Štefan Füle announced that Bosnia and Herzegovina was making good progress and that the entry into force of the Stabilisation and Association Agreement with the EU is near. However, Bosnia and Herzegovina first needs to bring its constitution in line with the ECHR. Other aspects that need to be dealt with include the financing of the Anti-Corruption Agency and the effective co-ordination of EU matters. (EDB)

► eucrim ID=1202002

#### Schengen

##### Council and EP Fight over Schengen Proposal

On 7 June 2012, the Council changed the legal basis of a proposed reintroduction of internal border checks within the Schengen area in the middle of the legislative process. The new legal basis (Art. 70 instead of Art. 77 TFEU) means that the EP will only have a consultative role and is no longer the co-deciding body next to the Council. Following this

event, the leaders of the political groups and the EP President suspended cooperation on other files concerning border security until the matter is resolved. These include the Schengen Implementation Agreement and the European Investigation Order.

The Council's new compromise text allows for reintroducing border controls in 3 cases. Under the heading of serious threats to public policy or internal security both foreseeable events and urgent cases are included and as a third case, persistent serious deficiencies at external borders is a possible ground (see also eucrim 3/2011, pp. 95-96).

The original proposal provided for the Commission to take the decision on whether or not to set up border checks. The EP preferred to keep the decision making power with the Member States, although it proposed a more coordinated approach and a collective decision-making process. The Council's new approach should now form the basis of the negotiations with the EP. (EDB)

► eucrim ID=1202003

##### Commission Presents First Overview on the Functioning of Schengen

As part of the Schengen Governance Package of 2011 (see eucrim 4/2011, p. 135), the Commission presented its first report on the functioning of the Schengen area on 16 May 2012 (COM(2012) 230 final). The report covers the period of from 1 November 2011 to 30 April 2012 and contains assessments of the situation at the external Schengen borders and within the area, the application of Schengen

\* If not stated otherwise, the news reported in the following sections cover the period March – June 2012.

rules, visa procedures, the issuance of residence permits and travel documents, and police measures at internal borders.

The report concludes with a set of guidelines to ensure coherent implementation and interpretation of the Schengen acquis in Annex II. A calendar providing the dates for the Schengen evaluations from May to October 2012 is included in Annex I. It is the Commission's intention to present these evaluation reports twice a year. (EDB)

► [eucrim ID=1202004](#)

## Institutions

### Commission

#### Charter of Fundamental Rights Gains Importance in EU Policy-Making

On 16 April 2012, the Commission presented the second annual report on the EU Charter of Fundamental Rights. The Charter has been in force for two years now and aims at guaranteeing that the EU institutions respect fundamental rights when preparing new EU legal instruments. In addition, the Charter should be complied with when the ECJ rules on the interpretation of these legal instruments and when Member States implement them. In the latter case, the Commission can initiate infringement proceedings against a Member State that fails to respect the Charter.

A new Flash Eurobarometer survey released on 16 April 2012 indicated that citizens are increasingly aware of the Charter. (EDB)

► [eucrim ID=1202005](#)

### OLAF

#### OLAF's Annual Report 2011

On 3 July 2012, OLAF published its annual report. The report summarises OLAF's achievements in 2011 and outlines its reformed structure, which took effect on 1 February 2012.

Key changes to OLAF's structure focused on its internal organisation and investigative procedures (see [eucrim 1/2012](#), p. 5). In the course of 2011, 144 investigations were opened. This number is lower than in previous years, as OLAF focused on closing old cases. Altogether 208 cases were closed in 2011, 175 of which resulted in recommendations for action to be taken by national authorities or EU institutions, bodies, and agencies. At the end of 2011, 463 investigation and coordination cases were still ongoing. A total of €691.4 million was recovered in 2011. In this year, OLAF also saw an increase in the input of information from private sources while information originating from public sources decreased. (EDB)

► [eucrim ID=1202043](#)

### Europol

#### Director's Term of Office Extended

At its meeting of 8 March 2012, the JHA Council decided to extend the term of office of the Director of Europol, Robert Wainwright, for a second mandate of four years from 16 April 2013 to 15 April 2017. This decision follows an earlier opinion on the extension of the term of office of the Director by the Management Board of Europol. (CR)

► [eucrim ID=1202006](#)

#### Revision of Europol's Legal Basis

In March 2012, the Commission services have drafted a working paper outlining ideas for the revision of Europol's legal basis, with the overall goal of improving Europol's operational efficiency, effectiveness, and accountability. Possible objectives listed in the working paper are:

- To improve Europol's intelligence by enhancing the provision of information to Europol by Member States, in both quality and quantity. In order to achieve this objective, the Commission suggests introducing incentives for investigations into crime areas other than Euro counterfeiting and establishing a mechanism

of checks and balances to ensure that Member States comply with their obligations towards Europol;

- To ensure that Europol has more effective contacts with Member States by reviewing the role of the Europol National Units (ENUs) in order to give national competent authorities more space to liaise with Europol. In pursuit of this objective, the Commission suggests considering the possibility of direct contacts with national competent authorities in the future regulation. Furthermore, under the new regulation, the ENUs could have access to relevant national law enforcement databases;

- To facilitate access by Europol to private sector-held information. According to the Commission's working paper, this could be achieved by introducing provisions to the new regulation on information exchange with the private sector;

- To trigger investigative action at the Member State level, for instance, by improving the follow-up given to Europol's findings. According to the working paper, this could be achieved by strengthening the provision that empowers Europol to request of Member States the initiation of a criminal investigation and by obliging Member States to supply a reasoned justification if they decide not to go ahead with the investigation within a given deadline, and, finally, by strengthening Europol's obligation to inform Eurojust of a *notitia criminis*;

- To create more flexibility in information management in order to gain better effectiveness. For this purpose, redesigning Europol's data management concept could be considered;

- To rationalise Europol's means of exchanging information with third partners through a new system enshrined in the new regulation;

- Ultimately, to strengthen the external data protection supervisory authority.

The paper has been sent to the Standing Committee on Operational Cooperation on Internal Security (COSI) on 29 March 2012. (CR)

► [eucrim ID=1202007](#)

## EU Terrorism Situation and Trend Report (TE-SAT) 2012 Published

Europol has published its EU Terrorism Situation and Trend Report (TE-SAT) 2012. The TE-SAT aims to provide law enforcement officials, policymakers, and the general public with facts and figures on terrorism in the EU while also seeking to identify trends in the development of this phenomenon. It is a public report produced by Europol on the basis of information provided and verified by the competent law enforcement authorities in the Member States of the EU as well as contributions from third states and Eurojust.

In 2011, 174 terrorist attacks took place in seven EU Member States, and 484 individuals were arrested in the EU for terrorist-related offences, with 316 individuals convicted for terrorist-related offences. According to the report, the year 2011 presented a highly diverse terrorism picture, which will probably be mirrored in 2012, with a possible increase in lone and solo actor plots in 2012. Lone actors were responsible for the killing of two persons in Germany and 77 persons in Norway.

“Established” methods used to finance terrorism include hostage taking, the abuse of social benefits in EU Member States, and the Internet. Of growing concern is the use of improvised explosive devices (IEDs) by terrorists, while the use of commercial explosives continues to decrease. The main channel of communication seems to be the Internet – it is used for a range of purposes, including instruction, recruitment of supporters, dispatch of members to conflict areas, fundraising, facilitating cooperation with other terrorist organisations, and the planning and coordination of attacks. Cybercrime has developed from a niche activity into a mature service industry.

Looking concretely at religiously-inspired terrorism, the number of individuals arrested for offences related to violent jihadist terrorism dropped from 179 in 2010 to 122 in 2011. Neither the political changes in Arab countries nor

the death of Osama bin Laden in 2011 led to a visible increase in activities by al-Qaeda affiliated terrorist groups in the EU. In fact, in 2011, no al-Qaeda affiliated or inspired terrorist attacks were carried out in EU Member States.

However, European home-grown groups remain the principal concern of many Member States. These groups are becoming less homogeneous in terms of ethnicity but instead base themselves on a common ideology. Looking at the future development, the report states that al-Qaeda will remain a key player in the field of religiously-inspired terrorism with its efforts being concentrated on attacking long-standing targets and major events in EU Member States to maximise its impact. According to the report, religiously-inspired terrorism continues to be largely driven and sustained by geopolitical developments.

Concerning ethno-nationalist and separatist terrorism, in 2011, 110 attacks were carried out in France and Spain. 247 individuals were arrested for separatist terrorism-related offences in EU Member States. The year 2011 saw a significant decrease in the number of terrorist attacks in Spain following the announcements made by ETA about the definitive cessation of its armed activity. However, EU Member States provide important logistical support bases for groups based outside the EU.

In the field of left-wing and anarchist terrorism, 37 terrorist attacks were carried out in EU Member States (in Denmark, Germany, Greece, Italy, and Spain) and 42 individuals were arrested. A notable new method used in 2011 by left-wing or violent anarchist extremists was the targeting of specific weak points in the railway infrastructure. Another notable novelty is the shift in the direction of left-wing violent extremists towards environmental issues.

In the area of right-wing terrorism and violent extremism, in 2011, the threat came from undetected lone actors or small groups rather than established extreme right-wing groups. One right-

wing terrorism attack was reported by Spain and five individuals were arrested for right-wing terrorism in Germany. A growing cause for concern are the austerity programmes – due to the economic crisis, immigration, and multiculturalism issues – combined with disillusionment with mainstream politics, which may lead to an increase in violent right-wing activities.

In the field of single-issue terrorism, increased activity has been reported for violent animal rights extremist groups. Although no single-issue terrorist attacks or arrests were reported by Member States in 2011, a number of incidents and activities were reported, which indicate that violent single-issue extremist groups focus on a broad range of targets, including indirectly related institutions and businesses. Furthermore, the increasing cross-border cooperation between several types of violent extremist groups seems to be a cause for concern. In the future, the report anticipates that the increasing sensitivity in society to environmental issues may lead to an increase in violent actions by single-issue violent extremist groups.

Looking at the future in general, Europol sees an outstanding feature in the wide diversity of threats posed by terrorist and violent extremist groups to EU Member States. It is feared that the connections between terrorist, violent extremist, and organised criminal networks will become increasingly blurred, with their influence enhanced by the further globalisation of communication. Although there is neither one single factor that explains radicalisation nor is there any agreed method to discover whether a radicalised individual might commit violence, radicalisation is often found among the most vulnerable individuals in society.

In its annex, the report includes tables outlining the failed, foiled, and completed attacks in 2011 per Member State and per affiliation as well as data on convictions and penalties. (CR)

► [eucrim ID=1202008](#)



## EMCDDA-Europol Annual Report on Substances Posing Public Health and Social Threats

In April 2012, the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) and Europol presented their seventh Annual Report for the period January to December 2011 on the implementation of Council Decision 2005/387/JHA of 10 May 2005 on the information exchange, risk assessment and control of new psychoactive substances. Council Decision 2005/387/JHA establishes a mechanism for the rapid exchange of information on new psychoactive substances. The report presents the activities implemented by the EMCDDA and Europol in 2011 regarding substances that may pose public health and social threats, including the involvement of organised crime.

According to the report, during 2011, a total of 49 new psychoactive substances were officially noted for the first time in the EU via the national Early Warning Systems (EWS), being the largest number of substances ever reported in a single year. Synthetic cannabinoids and cathinones represented about two thirds of the number of newly identified substances noted in 2011. The total number of synthetic cannabinoids reported amounted to 45, the largest drug family monitored by the EMCDDA. According to the report, this increase forms part of a steady development of the “legal highs” phenomenon (psychoactive substances obtained legally or by diversion from medical use). The report sees this as a reflection of both the number of substances available in the EU as well as the improved reporting capacities of national EWS.

Concerning the production and distribution of new psychoactive substances, the report finds that most of the new psychoactive substances were produced and acquired from outside Europe and sold mainly as “legal highs” via the Internet, smartshops (shops specialised in the sales of psychoactive substances), and headshops (shops specialised in

drug paraphernalia used for consumption of cannabis). The report sees China, followed by India, as the main source country. Looking at the prevalence of “legal highs” at the European level, the 2011 Eurobarometer (a survey based on interviews with over 12,000 young people aged between 15 and 24 across Europe) showed that 5% of its respondents reported having used “legal highs.” In most EU countries, no more than one of 20 young people reported having used legal substances that imitated the effects of illicit drugs. However, in the UK, Latvia, and Poland, self-reported use of “legal highs” was close to 10%, and 16% of the respondents in Ireland were the most likely to say they had used new substances. 54% of those young people who had experience with new substances indicated that they had been offered such substances by friends, 37% had been offered such substances during a party or in a pub, and 33% had bought these substances in a specialised shop, e.g., a smartshop. Only 7% of interviewees had bought these substances over the Internet.

With regard to the number of online drugs shops offering at least one psychoactive substance/product, the report found that this number rose from 170 in January 2010 to 314 in January 2011 and from 630 shops identified in July 2011 to 690 in January 2012. According to the report, this major increase may stem from a rise in the number of “US shops” although establishing the country of origin of online shops would be difficult.

Looking at the achievements of the EMCDDA in 2011, the report found that, by the end of 2011, the EMCDDA’s “Match” tool (a project that attempts to relate product names to their content) comprised more than 300 product/substance(s) entries, thereby providing insight into the most commonly sold products/substances. Furthermore, public health warnings had been issued in response to the EWS concerning adverse health effects related to several substances.

Meetings organised in 2011 included a “trendspotter” meeting on “Recent shocks in the European heroin market: explanations and ramifications” and two expert meetings on wastewater analysis.

For the future, the report underlines the need for a proactive rather than a reactive approach in order to remain vigilant and react rapidly to the new substances and products identified. The report regrets the current inability to anticipate emerging threats by actively purchasing, synthesising and studying new compounds.

The report is accompanied by three annexes outlining (1) the new psychoactive substances reported to the EMCDDA and Europol; (2) the working definitions on new drugs as used by the EMCDDA; and (3) the main groups of new psychoactive substances monitored by the EWS. (CR)

➤ [eucrim ID=1202009](#)

## Second Cybercrime Prevention Bulletin Released: Focus on Geosocial Networking

On 10 April 2012, Europol released its second cybercrime prevention bulletin focusing on geosocial networking, i.e., services which combine social networking with one’s offline location, for instance, to find directions, to search for restaurants, etc.

The bulletin provides information on the potential risks occurring with some of these services, e.g., making one’s data available to third-party app developers, allowing them to see one’s profile information, photos, and even offline location. The bulletin sees a risk in the physical safety of some users, particularly children.

Hence, the bulletin recommends users of social media to take control of their privacy settings, to make sure that they know whether they can switch their location on or off when using a geosocial app on a smartphone or tablet, and to review their account settings on a regular basis. For parents with children using such apps, the bulletin recommends

making their children understand the risks of sharing their offline location and to make sure that they know how to control how much of their information people see online. (CR)

► eucrim ID=1202010

## Eurojust

### Michèle Coninx Elected as President of Eurojust

On 17 April 2012, the College of Eurojust elected Michèle Coninx, Vice-President and National Member for Belgium, as President of Eurojust. The necessary approval by the Council of the EU was given on 26 April 2012. Ms. Coninx' mandate commenced on 1 May 2012.

Before becoming President of Eurojust, Ms. Coninx had a longstanding career at Eurojust, joining Pro-Eurojust in 2001 as National Member for Belgium and President of Pro-Eurojust. From December 2007, Ms. Coninx was Vice-President of Eurojust and member of the Presidency Team. From December 2009 to February 2010, she held the position of acting President of Eurojust. In February 2011, she was once again elected Vice-President of Eurojust.

Before joining Eurojust, Coninx was national prosecutor in Belgium in charge of coordinating the fight against organised crime and terrorism at the national level, with full jurisdictional powers over the 27 Belgian chief prosecutors.

Ms. Coninx replaces Aled Williams, former National Member of the UK, who has retired. (CR)

► eucrim ID=1202011

### European Parliament Study: The Future of Eurojust

At the beginning of May 2012, the Policy Department C 'Citizens Rights and Constitutional Affairs' of the Directorate-General for Internal Policies of the European Parliament published a study on the future of Eurojust. The study focuses on the key issues related to the future of Eurojust in the light of the new

framework established by the Treaty of Lisbon.

According to the study, three different paths can be mapped out with regard to Eurojust's future. First, the course set by the 2008 Decision on the strengthening of Eurojust and amending Decision 2002/187/JHA is the most relevant to Eurojust's immediate future. With the full implementation of the 2008 decision, the study sees ample opportunity to attain a more enhanced degree of cooperation in serious cross-border criminal cases. The second path would be the new legal basis provided by the Treaty of Lisbon offering the possibility to depart from the current model on which Eurojust is constructed. At present, however, the study sees this solution to be more of a medium-term possibility. The third path could be set by the establishment of the European Public Prosecutor's Office (EPPO) that would have a very significant bearing on Eurojust's future. In any case, the study does not describe these paths as mutually exclusive, but cautions to take great care as to the sequence in which each path is taken.

According to the study, the main issues to be addressed when discussing the reconsideration of Eurojust's current regulatory framework are: Eurojust's structure, function, and accountability. However, the study points out that, before these issues can be addressed in the context of the potential paths of development, Eurojust's main objective must be identified and the question answered as to whom the body serves. According to the study, a definite answer must be given as to whether Eurojust serves the national authorities or a European agenda taking action based on EU interests.

Looking at the establishment of Eurojust and its structure and organisation in detail, key findings of the study include:

- The institutional framework of Eurojust would represent an intergovernmental-style, hybrid structure;
- To date, the study sees Eurojust rather controlled by national laws and national authorities but acknowledges an implicit

shift towards a more integrationist style;

- Eurojust's inter-institutional placement and related control mechanisms would largely reflect Eurojust's inter-governmental origins;
- A high degree of formal autonomy for Eurojust would be ensured by the present EU legal framework;
- The national laws and hierarchies to which Eurojust national members are bound would create a second layer of control.

Regarding the functioning of Eurojust, the study concludes that:

- Obliging national authorities to transmit information on serious crime to Eurojust could have significant potential;
- A proactive use of the information transmitted to Eurojust could truly change the functioning of Eurojust;
- It is observed that Eurojust generally follows an informal operational style and keeps this modus operandi even though it has been prescribed with formal powers. Hence, recourse to formal powers should be made more often;
- Eurojust has acquired an intelligence-led rationale and a more articulated accusatorial role.

Looking at the further development and status of Eurojust within the area of freedom, security and justice, the study sees:

- The implementation of the 2008 decision as a *sine qua non* condition for any discussion about the future of Eurojust;
- Potential in the current legislative environment that would still allow, without major reform, further improvement of Eurojust's structure, functioning and accountability;
- A new path set out by Art. 85 of the TFEU, opening up a number of possibilities to strengthen and hence redirect Eurojust. However, Art. 85 of the TFEU would need to be invoked with a clear vision of who Eurojust is ultimately meant to serve;
- Reorganisation of Eurojust would be inevitable in order to bring it in line with the spirit of the new treaty base;
- The power to initiate investigations could be regarded as genuinely shifting



Eurojust towards a more intelligence-led rationale, into a position of shaping and not only witnessing events;

- Accountability rules should be in place ensuring performance review and clear policy direction and not result in overburdening Eurojust with parallel or overlapping procedures;

- With regard to the potential establishment of an EPPO, the report finds that the sequence in which Eurojust and the EPPO are dealt with would be of great relevance. According to the report, the EPPO would add a degree of complexity to the current way judicial cooperation in criminal matters is administered. Hence, the way in which the EPPO will be organised will have a significant bearing on Eurojust. (CR)

► [eucrim ID=1202012](#)

### Eurojust Operation “Nanny”

On 6 March 2012, Eurojust ran an Operational Coordination Centre at its premises in The Hague to coordinate in realtime police and judicial actions in an international case of trafficking, marketing, and distribution of pornographic material featuring minors via the Internet and specifically using a social network hosted on servers located in the USA.

After the social networks had first been frozen and had then been seized by the US authorities, IP addresses were identified and located in 12 Member States, the USA, Norway, Turkey, Ukraine and Asia. Eurojust then coordinated search and seizure activities to be carried out in several Member States, and two coordination meetings were held at Eurojust to prepare the action day.

During this particular day, France, Portugal, Germany, Spain, Sweden, and Italy were actively involved, supported by Eurojust, Europol, and Interpol. The operation resulted in numerous house searches, seizures of computers, arrests of ten suspects worldwide, the identification of many IP addresses, and investigations against 112 persons for criminal association. (CR)

► [eucrim ID=1202013](#)

## Frontex

### European Ombudsman Opens Inquiry

On 6 March 2012, the European Ombudsman, P. Nikiforos Diamandouros, opened an own-initiative inquiry into the implementation by Frontex of its fundamental rights obligations.

According to the Ombudsman, this inquiry became necessary for the following reasons: With the entry into force of the Lisbon Treaty, the Charter of Fundamental Rights of the EU had become legally binding on Frontex being an EU agency. Subsequently, the European Parliament and the Council adopted Regulation 1168/2011/EU (see [eucrim 4/2011](#), p. 141), which explicitly provides that Frontex shall fulfil its task in full compliance with the Charter and requires Frontex to put in place certain administrative mechanisms and instruments to promote and monitor compliance with these obligations.

In order to clarify whether Frontex has actually implemented these provisions, the Ombudsman in his inquiry asks Frontex for its position regarding

the state of play of implementation of its Fundamental Rights Strategy, the relevant Codes of Conduct, and its Fundamental Rights Officer. With regard to the European Border Guard Teams and Coordinating Officer, the Ombudsman asks how the responsibility for their possible failure to respect fundamental rights is set and for the role of the Coordinating Officer in this. Finally, looking at the possibility to terminate joint operations and pilot projects, the Ombudsman seeks information on the procedures and criteria used to identify possible violations of fundamental rights to make use of this possibility.

On 22 May 2012, Frontex has sent its response to the European Ombudsman’s enquiry underlining that since 2012, it had developed a fundamental rights strategy and related action plan, commissioned an external study on the ethics of border security, and developed a binding code of conduct for staff and guest officers participating in our activities. Furthermore, Frontex outlines that from the new mechanisms created to ensure the protection of fundamental rights

### Data Protection in the Area of European Criminal Justice Today

ERA, Trier/Germany, 5-6 November 2012

This seminar will provide participants with in-depth knowledge of the current reform measures taken by the EU in the area of data protection in criminal justice. An update will also be given on the state of play regarding pending issues such as Passenger Name Records (PNR) and data retention as well as their impact on data protection rights. Key topics will be:

- The Commission’s package for reforming data protection in the EU: pros and cons of splitting the proposals?
- The proposed Directive on data protection in the area of police and justice: a sufficient measure?
- The Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters: an outdated tool?
- Using Passenger Name Records (PNR): solution or never-ending story?
- Accessing private sector data: the need for common regulations for the police?
- The Data Retention Directive: the way forward?
- Transfer of data to third states: a sufficient framework on the EU level?
- The new EU agency for the operational management of large-scale IT systems managing the VIS, Eurodac, and future SISII: data protection framework?
- Law enforcement access to Eurodac: content of the Commission’s proposal of 30 May 2012?

The conference will be held in English.

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in the amended Frontex Regulation, the position of a Fundamental Rights Officer has already been advertised, invitations to join the Consultative Forum shall be issued in the near future after a public call for interest (published on 29 May 2012); and a “Frontex standard operating procedure to ensure respect of fundamental rights in joint operations and pilot projects” has already been drafted. (CR)

►eucrim ID=1202014

## Specific Areas of Crime / Substantive Criminal Law

### Protection of Financial Interests

#### EP Asks Commission to Take Action against Misuse of EU Funds

On 10 May 2012, the EP adopted a resolution calling on the Commission to improve the reporting of fraud and corruption in Member States’ spending of EU funds as well as the collection of customs duties and VAT.

The collection of customs duties and VAT are two traditional sources of the EU’s budget. In order to protect the EU’s financial interests, it is crucial to dispose of accurate information on the misuse of these funds. Accurate statistical data on the scope of these types of misuse, however, are lacking. Thus, the EP requested the Commission to take measures, including an increased effort to recover irregular payments and by imposing effective sanctions. With regard to customs duties, the EP asked the Commission to draw up an action plan to fight smuggling (especially cigarettes and alcohol) at the EU’s eastern border and the renewed customs cooperation deals with China and Russia.

Furthermore, the EP pointed out that the difference between the amounts of VAT that Member States should theoretically collect and their actual VAT revenue is alarming with regard to Member States such as Greece and Ita-

ly. According to the EP resolution, this is also attributable to fraud. VAT losses are largely compensated for via austerity measures affecting those EU citizens whose income is easily traceable. (EDB)

►eucrim ID=1202015

#### Discussions on Starting Revision of Tax Agreements Failed

On 15 May 2012, the Commissioner for Taxation and Customs Union, Audit and Anti-Fraud, Algirdas Šemeta, announced that discussions in the Council on the negotiation mandate for revising the existing savings tax agreements with neighbouring third states had failed.

The agreements on the taxation of savings income with Switzerland, Liechtenstein, Monaco, Andorra, and San Marino were signed in 2004 and were concluded to assist Member States in recovering tax revenue from citizens who have savings accounts in these countries. At the present time, the EU Directive on the taxation of savings income (Directive 2003/48/EC) is being amended. This revision, together with the agreements, should increase the efficiency of both instruments whilst reflecting changes to savings products and developments in investor behaviour. According to Commissioner Šemeta, Austria and Luxembourg are blocking the opening of negotiations in order to protect their own national interests.

The Danish presidency therefore included the issue in a report to the European Council. In its conclusions of the meetings on 28-29 June 2012, the European Council stated that rapid agreement must be reached on the negotiating directives for savings taxation agreements with third countries. (EDB)

►eucrim ID=1202016

### Money Laundering

#### Application of Third Anti-Money Laundering Directive

On 11 April 2012, the Commission adopted a report on the application of the Third Anti-Money Laundering Di-

rective (Directive 2005/60/EC). The Directive has been in force since 2005 and provides an EU legislative framework based on the international standards on combating money laundering and the financing of terrorism and proliferation adopted by the Financial Action Task Force (FATF). Because a revision of these standards was published on 16 February 2012 and because the third AML Directive is itself in the process of being revised, the Commission adopted a report in which it considers how the framework may need to be amended.

The report concludes that no substantial changes are required; a number of aspects need to be altered in order to adapt to the evolving threats. An assessment of the Directive’s provisions regarding lawyers and other independent legal professionals is also included in the report. The publication of this report is followed by a consultation of stakeholders. The Commission plans to present a proposal for a Fourth Anti-Money Laundering Directive in the fall of 2012. (EDB)

►eucrim ID=1202017

### Counterfeiting & Piracy

#### ACTA Rejected by the European Parliament

On 22 February 2012, the European Commissioner for Trade, Karel De Gucht, announced the Commission’s decision to refer the Anti-Counterfeit Trade Agreement (ACTA) to the ECJ. Even though ACTA has already been passed to the national governments for ratification and to the EP for debate (see eucrim 1/2012, p. 8), the referral was considered necessary to verify the legality of this legal instrument. The Agreement has been met with wide-ranging concerns by the general public, especially regarding freedom of the Internet and freedom of speech. Thus, the Commission decided to refer the matter to the ECJ and request it to rule on the compatibility of ACTA with the EU’s fundamental rights and freedoms.

On 25 April 2012, EP rapporteur David Martin presented his recommendation regarding the EP's consent to the International Trade Committee. He recommended rejecting the Agreement but alternatively proposed a renegotiation. A rejection would be based on ACTA's shortcomings, which include an unclear definition of "commercial scale" and the power of Internet service providers to act as police authorities on the Internet.

Nevertheless, in view of ACTA's referral to the ECJ, the Chairman of the International Trade Committee, Vital Moreira, asked the EP to first clarify if it is legally possible and politically admissible to vote on it.

The vote within the International Trade Committee on 20 June 2012 was negative. The following vote in the EP plenary on 4 July 2012 also resulted in a rejection. This means that neither the EU nor its individual Member States can join the agreement. (EDB)

►eucrim ID=1202018

## Organised Crime

### Special EP Organised Crime Committee to Be Established

On 14 March 2012, the EP adopted the mandate for a new special committee on organised crime, corruption and money laundering, its powers, numerical composition, and term of office. Plans for setting up this committee were already made in October 2011 (see eucrim 4/2011, p. 143).

The committee has a mandate for one year and should focus on the extent/impact of organised crime on the EU economy and society. It should recommend legislative and non-legislative measures to enable the EU to respond to these threats at the national, European, and international levels. The implementation of the role and activities of relevant EU agencies such as Europol, Eurojust, and COSI will also be examined by the committee.

In performing these tasks, the committee will conduct hearings as well as on-site visits. It will involve academics,

business and civil society, victims' organisations, law enforcement agencies, judges, and magistrates. The committee will have to report its findings to the EP and formulate recommendations on measures to be taken. The committee of 45 members took up its activities on 1 April 2012. (EDB)

►eucrim ID=1202019

### New Regulation on Trafficking Firearms

On 8 March 2012, the Council adopted a new regulation laying down rules on export authorisation for firearms. The regulation is the implementation of Art. 10 of the UN protocol against the illicit manufacturing of and trafficking in firearms, supplements the UN Convention against Transnational Organised Crime.

The regulation aims to improve measures regarding the import and export of firearms for civilian use. For this purpose, a list has been included in the text on the regulation of firearms, their parts, and essential components and ammunition for which an export authorisation should be issued by the authorities of the Member State where the exporter is established. Cooperation and information exchange between the competent authorities of the Member States is crucial.

This regulation completes the transposition into EU law of all provisions of the aforementioned UN protocol. (EDB)

►eucrim ID=1202020

## Cybercrime

### Commission Establishes EU Cybercrime Centre

On 28 March 2012, the Commission introduced its proposal to establish an EU Cybercrime Centre within Europol in The Hague, the Netherlands.

As one of the objectives of the EU Internal Security Strategy (see eucrim 1/2011, p. 2), the Cybercrime Centre should be the focal point in fighting cybercrime for the EU. It will focus on illegal online activities carried out by organised crime groups, particularly those

generating large criminal profits, e.g., online fraud involving credit cards and bank credentials. The Centre will issue warnings on large cybercrime threats to the Member States and alert them of weaknesses in their systems. It will also provide operational support in investigations and can even be involved in joint investigation teams.

The Centre will also function as a platform for information and expertise to investigators, prosecutors, and judges. It is expected to be operational from January 2013 onwards. (EDB)

►eucrim ID=1202021

### Attacks against Information Systems – State of Play

On 27 March 2012, the EP's Civil Liberties Committee endorsed the proposed Directive on attacks against information systems, repealing Framework Decision 2005/222/JHA. The text harmonises criminal sanctions for perpetrators of cyberattacks against an information system (e.g., a network, database, or website).

According to the proposal, illegal access, interference, or interception of data will also be treated as a criminal offence with maximum penalties of at least two years of imprisonment. This could be increased to five years in case of aggravating circumstances, e.g., using another person's IP address to commit an attack.

The tools that are used to commit these offences are equally included in the text of the proposal. The production or sale of devices, such as programs designed for cyber-attacks or that find a computer password by which an information system can be accessed, would thus constitute a criminal offence.

In accordance with the proposal, legal persons would be liable for offences that were committed for their benefit, whether deliberately or through a lack of supervision.

It is expected that the EP and the Council reach political agreement on this proposed directive by the summer of 2012. (EDB)

►eucrim ID=1202022

## Procedural Criminal Law

### Procedural Safeguards

#### Commission's Proposal to Enforce the Right to Information in Criminal Proceedings

On 26 April 2012, the Council adopted the Directive on the right to information in criminal proceedings (see eucrim 1/2012, p.12; eucrim 3/2011, p. 108) that ensures defendant's rights in this sector during criminal proceedings. The EP already has given its green light on 13 December last year.

After the implementation, any person suspected or accused of having committed a crime is to provide with his or her procedural rights and has to be given access to the materials of the case. Up to now rights included in the Directive existed in just about one third of the EU Member States. The Directive has to be transposed into national law within two years after its publication in the Official Journal. (CK)

►eucrim ID=1202023

### Data Protection and Information Exchange

#### Directive for Use of PNR Data for Law Enforcement Purposes – State of Play

During the JHA Council of 26-27 April 2012, the Council reached a general approach on the proposed Directive on the use of flight passenger data for protection against terrorist offences and serious crime (see eucrim 2/2011, p. 62 and eucrim 1/2012, p. 13).

One of the outstanding issues concerned the scope of the proposal and whether it should include data on flights within the EU or not, alongside the PNR data of flights to and from third states. The compromise that was reached would allow, but not oblige, the Member States to also collect PNR data concerning selected intra-EU flights.

The question of data retention was

the second point of discussion. Since the original retention period of 30 days was considered too short, the solution that was reached is to make the data fully accessible for two years. After this period of time, the data will be masked, meaning they can only be accessed by an authorised officer. They will be retained in this masked form for another three years, keeping the total retention period to five years.

This compromise now allows the Danish presidency to start negotiations with the EP under the standard legislative procedure. (EDB)

►eucrim ID=1202024

#### Germany Tests Compliance of Data Protection Directive with Subsidiarity

Concerned that the EU was exceeding its competence with a legislative proposal on a data protection regulation, the German *Bundesrat* adopted two resolutions on 30 March 2012.

The above-mentioned data protection re-form package was presented on 25 January 2012 by the Commission and should replace the current Framework Decision and Directive. It reflects the need to deal with new challenges in data protection and the emergence of new technologies affecting the way personal information is used and exchanged globally. At the same time, criminal prosecution and execution are to be accelerated and improved through international, EU-wide cooperation within the framework of the package. It consists of two parts:

(1) Proposal for a regulation of the EP and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation);

(2) Proposal for a directive of the same institutions on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal

penalties, and the free movement of such data (see eucrim 1/2012, p.13).

The *Bundesrat* generally welcomes the pursued aims of facilitating police and judicial cooperation in criminal matters whilst respecting the fundamental right to the protection of personal data. Nevertheless, several doubts as regards compliance remain:

- The main point is the infringement of the subsidiarity principle: the proposal for a directive on data protection in criminal matters could not take Art. 12, Subsection 2, TFEU as its legal basis. The rationale is that the proposal also encompasses data processing in domestic proceedings insofar as it concerns purely national exchanges of information by police authorities. There is no legal basis for this type of data processing, which means that, as a consequence, the competences transferred to the EU have reached their limits;

- Therefore, secondly, the *Bundesrat* takes the view that the processing of personal data by public administrations in the Member States does not as a general rule fall under the legislative competences of the EU and should be excluded from the scope of application of the proposed regulation in order to avoid another breach of the subsidiarity principle;

- Thirdly, the *Bundesrat* finds it regrettable that the Commission's proposal extends far beyond the objectives of guaranteeing a high level of data protection in criminal proceedings, because it includes local police activities as non-crime-related security law instead of purely criminal prosecution.

- Furthermore, it is criticised that especially the second proposal would not give a satisfactory reason why a binding comprehensive directive at the EU level is needed here. It has not been demonstrated that the EU Member States would not be able to ensure a sufficient level of data protection within police and judicial authorities by developing descriptions of the tasks and activities of Data Protection Officers within these authorities.



■ Besides, the *Bundesrat* pointed out that the proposals run contrary to the principles of proportionality and subsidiarity. Because of their highly abstract approaches, comprising general requirements and rendering nuances, the rights of sector-specific data protection are becoming more uniform as the proposed Regulation refers to delegated acts of the Commission in essential questions of protecting privacy and other fundamental citizens' rights.

■ Ultimately, it is feared that a directive as planned would supersede proven national law completely.

Whether the *Bundesrat's* rebukes will be just noted or whether there will be a new examination through the EP and the Commission depends on whether other Member States will reprimand violations of transnational or international law.

Besides, there will still be the opportunity for Germany to take legal action for violating the subsidiarity principle when the legislative procedure has been completed. (CK)

➤ [eucrim ID=1202025](#)

### ECJ Ruling on Transparency of Council Documents

On 4 May 2012, the ECJ ruled in case T-529/09 that was against the Council by MEP Sophie in't Veld. In't Veld applied to the ECJ for the annulment of a Council decision of 29 October 2009 in which full access to document 11897/09 was refused. This document contains the opinion of the Council's Legal Service concerning a Commission recommendation authorising the opening of negotiations between the EU and the US on the so-called TFTP-Agreement (see [eucrim 2/2010](#), pp. 48-50). The Council refused full access to the document by stating that disclosure "would reveal to the public information relating to certain provisions in the envisaged Agreement ... and, consequently, would negatively impact on the [EU]'s negotiating position and would also damage the climate of confidence in the

ongoing negotiations." Additionally, the Council stated that the protection of an internal opinion of the Legal Service relating to a draft international agreement outweighs public interest in having the document disclosed.

In its ruling, the ECJ made a distinction between those parts of the document that could reveal strategic objectives the EU pursued in negotiations on the TFTP-Agreement and the remaining parts that ought to be released to the public.

Thus, the ECJ annulled the Council's decision in that it refuses access to the undisclosed parts of document 11897/09 other than those which concern the specific content of the envisaged agreement or the negotiating directives. (EDB)

➤ [eucrim ID=1202026](#)

### EU-US Agreement on the Transfer of PNR Approved by EP

On 19 April 2012, the EP voted in favour of the EU-US Agreement on the use and transfer of PNR to the United States Department of Homeland Security (see also [eucrim 4/2011](#), p. 147).

The agreement had already been drafted and approved by the Council on 14 December 2011. In accordance with the Lisbon Treaty, the EP needs to give its consent in order for it to enter into force. Based on data protection concerns, the 2007 agreement was only provisionally applied. It will now be replaced by the new agreement that will enter into force on the first day of the month after the date on which the Parties have exchanged notifications indicating that they have completed their internal procedures for this purpose. (EDB)

➤ [eucrim ID=1202027](#)

### Opinion of the European Data Protection Supervisor to the Reform Package

On 7 March 2012, the EDPS published his elaborate opinion to the Commission's proposals on reforming the EU's data protection legal framework (see [eucrim 1/2012](#), p. 13).

With regard to the proposed Directive on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences, the execution of criminal penalties, and the free movement of such data, the EDPS states the text does not meet the requirement of a consistent and high level of data protection. His concerns are especially directed at the following four points:

■ The purpose limitation principle and the lack of legal certainty about further use of personal data by law enforcement agencies;

■ Law enforcement agencies are not under a general obligation to reveal their collecting and processing of personal data in compliance with the data protection standards;

■ The provisions regarding transfers of personal data to third states are still too weak, especially with regard to the decision on the adequate level of data protection of a third state;

■ The powers of supervisory authorities are too limited.

The proposed directive is presently awaiting the EP's first reading. A rapporteur for the Civil Liberties Committee was appointed on 25 April 2012. (EDB)

➤ [eucrim ID=1202028](#)

## Confiscation and Freezing of Assets

### New Commission Proposal Changes the Legal Framework on Confiscation

On 12 March 2012, the Commissioner for Home Affairs, Cecilia Malmström, presented a new proposal for a Directive on the freezing and confiscation of proceeds of crime. In spite of mechanisms for freezing and confiscating proceeds of crime, large sums remain in the hands of the perpetrators. It is especially the differences between Member States' legislations that make it more complicated to confiscate and recover profits from cross-border crime.



The 2009 Stockholm Programme already called upon the Member States and the Commission to make the confiscation of criminal assets more efficient and to strengthen the cooperation between Asset Recovery Offices (see eucrim 4/2009, pp. 122-123). The 2010 Internal Security Strategy (see eucrim 1/2011, p. 2) announced that the Commission would introduce measures to strengthen the EU legal framework on confiscation, in particular to allow more third-party confiscation and extended confiscation as well as to facilitate mutual recognition of non-conviction-based confiscation orders between Member States. Before drafting the proposal, the Commission held consultations and discussions with experts. They were carried out in the plenary meeting of the Camden Asset Recovery Inter-Agency Network and in eight meetings of the EU's informal Asset Recovery Office Platform.

In order to further harmonise Member States' national legal frameworks and improve cross-border cooperation, the Commission proposes the following measures:

- More efficient rules on extended confiscation. This means confiscating assets that are not directly linked to a specific crime, but which clearly result from similar criminal activities by the convicted person;
- Third-party confiscation: The confiscation of assets that were transferred from the suspect to a third party who should have known that the assets derived from crime;
- Introduction of limited non-conviction-based confiscation: The confiscation of assets where a criminal conviction is not possible because the suspect is dead, permanently ill, or has fled. This is a system that is so far not installed in the majority of the Member States;
- Precautionary freezing: This measure aims at allowing prosecutors to temporarily freeze assets that risk disappearing if no action is taken, subject to confirmation by a court;

- Asset Management: Member States would be required to manage frozen assets so that they do not lose their economic value before they are eventually confiscated.

Furthermore, the Commission wants to ensure that measures taken to freeze and confiscate assets are balanced by a strong protection of fundamental rights, in particular the individual's right to presumption of innocence and the right to property.

The debates in the Council already started at the end of April 2012. A number of Member States emphasised the need to go further on the provisions on non-conviction-based confiscation while others stressed the need to make the proposed directive compatible with national legal instruments. (EDB)

►eucrim ID=1202029

## Cooperation

### Police Cooperation

#### CEPOL Work Programme 2012

On 8 March 2012, the Council approved CEPOL's Work Programme 2012 and forwarded it to the European Parliament and the Commission for information.

Priorities of CEPOL's work under the 2012 Work Programme include:

- To establish a comprehensive training needs assessment;
- To further develop and establish the European Police Exchange Programme;
- To further develop and enhance e-learning options and web-based seminars;
- To strengthen CEPOL's involvement in capacity-building activities, especially for civilian crisis management;
- To strengthen the aspect of fundamental and human rights in police training;
- To strengthen CEPOL's role in training on cybercrime to gain a central function in this area;

- To further develop an accredited post-graduate Masters Course on Police Cooperation in Europe;

- To further develop inter-agency cooperation;

- To enhance external cooperation with third countries.

According to the programme, 100 training activities are planned for 2012 in 12 categories, including serious and organised crime following the EU Policy Cycle, counter-terrorism, economic crime, special law enforcement techniques, human rights issues, crime prevention, etc. Furthermore, the European Police Exchange Programme shall be continued in 2012.

In the field of e-learning, CEPOL plans to finalise the development of e-learning online modules on the Lisbon Treaty and Joint Investigation Teams and to further elaborate and establish online seminars.

To evaluate its training activities in 2012, CEPOL plans to assess them by means of an in-depth analysis of the course, feedback, and post-course evaluation.

Looking at CEPOL's external relations, priorities for 2012 include further cooperation with European institutions and EU agencies, including enhancing cooperation with the European External Action Service. Formal cooperation agreements with associated and candidate countries and the involvement of Balkan countries in CEPOL activities will be envisaged, and the possibilities to enhance CEPOL's engagement with other strategic partners such as China and North America will be examined.

In the annex, the Work Programme includes an updated CEPOL (multi-annual) Strategy Plan 2010-2014 (see eucrim 4/2011, pp.142-143), a calendar of CEPOL's training activities, an overview of the allocation of its human and financial resources, its budget, and a table presenting critical risks that could affect CEPOL's functioning and growth. (CR)

►eucrim ID=1202030

## Judicial Cooperation

### Application of Mutual Recognition to Judgments in Criminal Matters

On 21 March 2012, the Council provided the Member States with updated information on the implementation of the Framework Decision on the application of the principle of mutual recognition to

judgments in criminal matters imposing custodial sentences (2008/909/JHA). The table in the annex offers up-to-date information on which Member States have transposed the framework decision, when this legislation entered or will enter into force and which are the competent authorities to be addressed. (EDB)

►eucrim ID=1202031

governments to resolve these deficiencies. In the process, the Court has the possibility to adjourn or freeze the related cases for a certain period of time (see also eucrim 2/2011, p. 71).

The newly published factsheets identify the violated rights (e.g., inhuman or degrading treatment, excessive length of proceedings), the relevant cases, and the identified structural problems. They list the measures that were required by the Court to dissolve these deficiencies and the follow-up proceedings.

►eucrim ID=1202034

### Election of New Judge in Respect of Belgium

On 24 April 2012, the Parliamentary Assembly (PACE) of the CoE elected a new judge. Paul Lemmens was elected for an office term of nine years as a judge to the ECtHR in respect of Belgium.

►eucrim ID=1202035

### Thematic Factsheets on the Court's Case Law Available in German and Russian

A series of factsheets on the ECtHR case law is now available on the Court's website in German and Russian. They also promote the protection of human rights at the national level. So far, the factsheets are only available in English and French. Since September 2010, some 30 factsheets were published on a number of issues according to theme (see also eucrim 4/2011 p. 151; 1/2011 p. 19 and 4/2010 p. 148).

►eucrim ID=1202036

### Other Human Rights Issues

#### Human Rights Commissioner Calls for Strengthened Co-operation between CoE and OSCE

On 2 February 2012, Thomas Hammarberg then CoE Commissioner for Human Rights, addressed the Permanent



## Council of Europe\*

Reported by Dr. András Csúri

### Foundations

#### Reform of the European Court of Human Rights

##### The Court Expands Its Range of Multimedia Materials

On 17 February 2012, the ECtHR placed its ECHR video clip online in another ten language versions, bringing the total number of versions available to 22. The video presents the main rights laid down in the ECHR. In addition, the film entitled "The Conscience of Europe," which includes specific examples of cases examined by the Court, has been remastered and is currently available in the 24 official languages of the CoE. Later in the year, the new video clip on the admissibility conditions of applications (see eucrim 1/2012 p. 16) will be made available in other language versions.

►eucrim ID=1202032

##### First Training Session with the Support of the Human Rights Trust Fund

The setting up of a training unit within the ECtHR is the first project implemented in the Court with the support of the Hu-

man Rights Trust Fund (HRTF). The fund was set up in 2008 by Norway, the CoE, and the CEB- Council of Europe Development Bank. Since then, Germany, the Netherlands, Finland, Switzerland, and the UK have joined the HRTF.

The training unit concerns Albania, Armenia, Azerbaijan, Georgia, the Republic of Moldova, Montenegro, Serbia, and Ukraine. It aims to provide professional groups with high-quality training in ECHR law and to help the dissemination of the Court's case law.

The first session for Armenian magistrates and lawyers took place on 4 and 5 April 2012. Three other sessions will take place this year.

►eucrim ID=1202033

#### Court Launches Factsheets on Pilot Judgments

In March 2012, the ECtHR published factsheets on its pilot judgements. The pilot judgement procedure was introduced to identify systematic dysfunctions on the national level that lead to violation of human rights in recurring cases. One task of the procedure is to make it an obligation for the respective

\* If not stated otherwise, the news reported in the following sections cover the period March–June 2012.

Council of the Organisation for Security and Co-operation in Europe (OSCE). He called for further cooperation to counter negative developments in human rights issues. The Commissioner identified the priorities of the two organisations as being similar, despite their different mandates. In his speech, he expressed concern about the impact of the economic crisis on human rights, mostly related to austerity budgets and undermined social rights.

Additionally, the Commissioner called for attention to be paid to human rights violations in the fight against terrorism and stressed once again the importance of the freedom and diversity of the media as a crucial aspect in all democracies (see eucrim 1/2012, p. 17).

► eucrim ID=1202037

### Muižnieks Takes up Office as Commissioner for Human Rights

On 1 April 2012, Nils Muižnieks of Latvia succeeded Thomas Hammarberg as the third CoE Commissioner for Human Rights. The change in mandates was also marked by the launching of the Commissioner's new website.

► eucrim ID=1202038

## Specific Areas of Crime

### Corruption

#### GRECO: Third Round Evaluation Report on Monaco

On 29 March 2012, the CoE's GRECO published its Third Round Evaluation Report on Monaco. As usual, the report focused on two distinct areas in need of improvement: the criminalisation of corruption and the transparency of party funding. The report detected significant deficiencies, in particular with regard to the current criminal code. The provisions do not cover offenses involving senior members of the executive and members of the assemblies. Bribery of foreign and international public officials

is only taken into account in the context of combating organised crime.

The report further stresses that the Monegasque political parties are not subject to any binding rules on transparency or any form of monitoring of income and expenditure.

GRECO made a total of 18 recommendations to the country and will monitor Monaco's responses in 2013.

► eucrim ID=1202039

#### GRECO Publishes Compendium on First Decade of Experiences

On 3 April 2012, GRECO published a compendium on the themes that have been dealt with over the first decade of its existence. The topics range from the fight against corruption within public administration to the independence of party funding monitoring to the protection of whistleblowers.

► eucrim ID=1202040

#### GRECO: Third Evaluation Round on Italy

On 11 April 2012, GRECO published its Third Evaluation Round Report on Italy. The report identified critical shortcomings in Italy's party funding system and called on the country to address these as a matter of priority.

The report detected that the control over political funding is fragmented, formalistic, and performed by different institutions with limited powers but without real co-ordination. The report urges the establishment of an independent auditing system as well as the setup of internal control systems within the political parties. GRECO recommends

substantially lowering the €50,000 threshold under which the identity of the giver of political donations remains unknown to the public and to ban anonymous donations.

The report made a total of 16 recommendations to the country and called on Italy to ratify the Criminal Law Convention on Corruption, as it is one of the Member States of the CoE not party to this instrument.

► eucrim ID=1202041

#### GRECO: 12th Activity Report

In its annual activity report published on 9 May 2012, GRECO called on its Member States to set up transparent systems for party and election campaign financing. The report pointed out amongst other deficits the following shortcomings:

- The possibility of anonymous donations in some countries;
- The lack of easy and timely access to relevant financial information;
- The absence of truly independent supervisory bodies;
- The often weak and inflexible sanctions.

The report stated, however, that offences in connection with bribery and trading in influence are largely in line with the Criminal Law Convention on Corruption, even if some countries still need comprehensive instead of fragmented legislation in the field.

Finally, in 2012, GRECO will start a new line of assessment reports regarding corruption prevention in respect of parliament, judges, and prosecutors.

► eucrim ID=1202042

#### Common abbreviations

CEPOL	European Police College
ECJ	European Court of Justice (one of the 3 courts of the CJEU)
ECtHR	European Court of Human Rights
EDPS	European Data Protection Supervisor
(M)EP	(Members of the) European Parliament
GRECO	Group of States against Corruption
JHA	Justice and Home Affairs
PNR	Passenger Name Records
TFEU	Treaty on the Functioning of the European Union

# The Initiative for a Directive on the Protection of the EU Financial Interests by Substantive Criminal Law

Dr. Lothar Kuhl

The European Commission adopted on 11 July 2012 a proposal for a Directive of the European Parliament and of the Council on the protection of the financial interests of the Union by criminal law.

In its 2011 Communication on the protection of the financial interests of the European Union by criminal law and by administrative investigations, the Commission highlighted the need to adopt new legal instruments on criminal-law protection of the Union's financial interests. Based on an analysis of the current challenges and shortcomings in the practice of criminal-law protection by the judicial authorities in the Member States, this communication identified specific weaknesses which also include the applicable legal framework. Notwithstanding the 1995 Convention on the protection of the European Communities' financial interests and its (additional) protocols of 1996 and 1997, which have been ratified by nearly all the Member States, there is no common level playing field in criminal law. The communication in 2011 therefore concluded there was a need for strengthened legal instruments to protect the EU against fraud using the opportunities offered under the Lisbon Treaty and it mentioned 3 aspects:

- strengthened criminal and administrative procedures;
- strengthened substantive criminal law;
- a strengthened institutional framework.

The substantive criminal-law initiative against EU-fraud is the first of 3 legal initiatives for the criminal-law protection of the EU's financial interests which the Commission intends to adopt by 2013 and which will also include a proposal for the setting up of a European Public Prosecutor's Office (EPPO).

## I. The Status Quo of Criminal-Law Protection and Its Challenges

a) The 1995 Convention on (criminal law) protection of the European Communities' financial interests<sup>1</sup> and its (additional) protocols<sup>2</sup> have meanwhile been ratified by nearly all the Member States. Currently only the Czech Republic has not yet ratified the convention and its protocols. Because of the slow ratification of the third-pillar instruments and following the entry into force of the Amsterdam Treaty and the introduction of ex-Art. 280 EC into the Treaty, the Commission had submitted

as early as 2001 a proposal for a Directive on the criminal-law protection of the Communities' financial interests.<sup>3</sup> Its content was based on the *acquis* of the convention. Following a first-reading report in the European Parliament (EP), however, the Council never adopted a common position, the stumbling block being a disagreement on the institutional powers of the EC to enact penal legislation under the EC-Treaty.

In 2004 and 2008, the Commission subsequently drew up two implementation reports to take stock of how Member States had fulfilled their obligations under the convention.<sup>4</sup> The Commission reports concluded that full implementation of the third-pillar instruments had not been achieved. Member States were invited to step up their efforts to implement the convention. Notwithstanding its ratification, not all Member States have taken specific measures to adapt their internal penal legislation to the binding legal terms of the convention. Concentrating on the EU-15 Member States, the Commission in its second report in 2008 concluded that there were serious shortcomings in the implementation of the convention with respect to the implementation in national legislation of the concept of fraud and its being punishable as a criminal offence.<sup>5</sup>

The Commission has not yet used dispute-settlement procedures under Art. 8(2) of the convention which would comprise – if it proved impossible to settle a dispute through negotiation – a submission to the Court of Justice. But the implementation of the convention has indeed never been just a matter of legal principle and formality. The Anti-Fraud Office (OLAF) and the Commission have gone to considerable lengths to show that the quality of implementation of the convention and its protocols may be at least partly responsible for the shortcomings in the practical implementation of national penal-law provisions by the authorities in the investigation, prosecution and bringing to judgment of cases of fraud and corruption involving EU interests. OLAF has highlighted the fact that the practice of national judicial authorities in the procedural handling of cases investigated and reported to them is not always effective, proportionate and dissuasive. The case record also does not support the conclusion that there is an equivalent level of criminal-law protection of financial interests throughout the EU.<sup>6</sup>

b) The proposal for a Directive on substantive criminal-law protection against fraud constitutes a stand-alone initiative.

However, the initiatives which the Commission set out in its 2011 Communication on criminal-law protection of the financial interests of the Union also include a strengthened institutional framework, including the setting up of a European Public Prosecutor's Office (EPPO). The material scope of its future mandate to investigate and prosecute offences against the Union's financial interests requires a uniform definition of the offences which may be the subject of its investigations. The question that then arises is whether a uniform criminal investigative mandate of an EU body may be limited to the adoption of minimum rules concerning the definition of the criminal offences, so as to achieve an advanced degree of approximation of national substantive criminal laws, or alternatively, whether it requires the adoption of a set of directly applicable common EU offences. Both approaches present advantages and disadvantages. The adoption of minimum rules for the approximation of national criminal offences presents the disadvantage that the minimum rules are not directly applicable, creating a risk of their being implemented by Member States in a way which is not fully equivalent. This could lead to disparities between Member States and national legal systems in the way the mandate of an EPPO to investigate and bring to judgment the offences under its mandate is implemented. On the other hand, a mandate which relies on criminal offences adopted under the laws of the Member States is much more in line with current legal traditions in the EU and can rely on the full set of substantive criminal rules available in the Member States. It also avoids creating a risk of conflicts between national and European offences at the trial stage.

## II. The New Proposal for a Directive against Fraud

The proposal for a Directive adopted by the Commission on 11 July 2012<sup>7</sup> reflects a balanced policy choice which takes into account a comprehensive analysis of the needs and of the impact of enhanced criminal-law protection against fraud (a). The initiative is based on the special legal basis under the Treaty on combating fraud (b). In accordance with its scope, the proposed Directive comprises definitions for the approximation of criminal law offences (c), general provisions on liability and sanctions (d) and minimum rules on jurisdiction and time limitation (e).

a) The Commission's proposal reflects a balanced policy choice which takes into account a debate it held with the stakeholders. On this basis, technical consultations have been conducted inside the Commission by the lead services OLAF and DG JUST, together with the other Commission services, about the needs and the approach to achieve an effective and dissuasive criminal-law protection against fraud and other criminal illegal conduct. As a result, it has been decided that punishable offences should

comprise only conduct which is committed intentionally. The measures adopted by the Member States must be proportionate and satisfy the objectives of deterrence in Art. 325 TFEU. This may require the introduction of more severe penalties for serious offences while at the same time leaving proper scope for administrative measures and sanctions in minor cases, so as to avoid over-criminalisation of conduct which, in the light of the nature of the facts and the scale of their financial impact, can more effectively be sanctioned using measures under administrative law. Although the EU needs to employ the necessary means to protect its own interests, thus justifying particular criminal-law instruments in the specific area of combating fraud, penal-law protection remains an instrument which should be used in strict compliance with fundamental rights, defence guarantees and general principles of law. Its application should be proportionate when compared to the other protective legal instruments available, options which may sometimes permit more efficient and faster action or prove less stigmatising for the persons concerned.

The Commission has evaluated the results of an external impact-assessment study on the legal framework for protecting financial interests through criminal law and on the basis of this it has drawn up its own impact assessment, taking into account the results of the stakeholder consultations. The proposal is submitted against the background of the economic and financial crisis. This context, combined with the situation of an enlarged EU facing greater challenges to ensuring equivalent protection throughout Europe, requires and justifies reinforced measures under criminal law to protect the EU's specific interests. It is indeed necessary to do more against criminal conduct which may jeopardise the tax-payers' money and prevent the EU's financial support from being a facilitator of growth and employment throughout Europe.

b) Making use of the new framework put in place under the Lisbon Treaty, the proposal is based on Art. 325 TFEU. The legal basis has been decided in accordance with the specific objectives of the proposal. The protection of a specific solidarity interest through measures which may act as a deterrent against fraud is the very purpose which Art. 325 TFEU envisages. The special legal basis under the Lisbon Treaty has been slightly clarified as compared to its precursor in ex-Art. 280 EC-Treaty, deleting a sentence in paragraph 4 which restricted the scope of the measures to be taken by excluding from the scope measures comprising the administration of justice and the application of national criminal law.

Given that the objective of the proposal is fully in line with Art. 325 TFEU, the proposed Directive will be adopted in accordance with the ordinary legislative procedure and in consultation with the Court of Auditors. It will not, however, be



subject to specific rules on opt in and opt out, as is the case for those minimum rules whose adoption is foreseen under the chapter on cooperation in criminal matters under the TFEU and more specifically under Art. 83 TFEU. Art. 83 includes the definition of minimum rules concerning criminal offences but it does not mention fraud amongst the areas of criminal conduct to which it applies, at least not in the absence of a specific Council decision, taken by unanimity and with the consent of the EP, to extend the scope of Art. 83. Even if the proposal might in practice be of relevance to the future EPPO, and squarely describes the material scope of the EPPO's future competences, its main purpose is not limited to enabling an EPPO to perform its functions. Therefore, Art. 86 TFEU is also not used as the special basis for the adoption of the proposed Directive on substantive law protection against fraud.

c) The proposal contains under its Title II certain provisions which may to some extent be qualified as mere *Lisbonisation* of criminal law concepts already currently covered under the convention and its protocols. This is mainly the case for the offence of fraud. Fraud affecting the Union's financial interests needs to be punishable as a criminal offence in the Member States. It is defined in line with the incriminatory elements as set out in Art. 1 of the convention distinguishing between fraud in respect of expenditure and revenue (Art. 3 of the proposal), with some very slight drafting changes. The financial interests of the Union are defined in Art. 2 of the proposed directive and cover the Union budget as well as the budgets of the institutions established under the Treaties and the budgets managed and monitored by them.

In addition to fraud, which requires the effect of causing damage, the proposal however adds a new fraud-related criminal offence currently not covered under the *acquis* of the third-pillar instruments. According to Art. 4(1), fraud in public procurement must be made punishable as a criminal offence. Public-procurement fraud consists of the provision of information to contracting or grant-awarding entities, or authorities in a relevant procedure, by candidates, tenderers or the responsible persons when committed with the aim of circumventing or skewing the application of the eligibility and award criteria. As compared for instance with the offence of market-rigging contained in Art. 2 of the Corpus Juris 2000, the offence does not require an agreement calculated to restrict competition. Its main constitutive element is the provision of information, including by third persons involved in the preparation of the reply to a call or in a grant application, with the aim of circumventing the application of the award criteria irrespective of its harmful effects on the EU budget. The proposal also includes the offences of money laundering and active and passive corruption as already currently covered under the third-pillar *acquis*. Money laundering as defined in Directive 2005/60/EC needs to be made a punishable offence if it involves the

proceeds of any of the offences covered under the directive (Art. 4(2) of the proposal).

The offences of passive and active corruption are comprised under Art. 4 (3) of the proposal in terms which are nearly identical to those used in Articles 2 and 3 of the 1996 protocol to the convention. For conduct to be criminal, an advantage must be requested, received or promised to make the official perform an action in the exercise of his functions. This conduct needs to be carried out intentionally in a way which damages or is likely to damage the EU's finances. A main difference with respect to the wording of the protocol is that the corruption offences under Art. 4(3) of the proposal do not refer to a *breach of (the) official duties* of the public official. A definition of *public official* is included in Art. 4(5). It includes persons exercising a public-service function, irrespective of whether or not they hold a legislative, administrative or judicial function, and those working under a private-law status who despite not holding such an office nevertheless participate in the management of specific EU financial interests.

A newly added offence of *misappropriation* is set out in Art. 4(4) of the proposal. Member States need to punish as a criminal offence any intentional act by a public official to commit or disburse funds contrary to the purposes for which they were intended and with the intent to cause damage to the EU. The proposal accordingly requires a decision to have been taken that is contrary to the legal objectives for which the relevant advantage is foreseen. The proposal does not – as did the Corpus Juris 2000 in its Art. 6 – explicitly refer to either illicit *private interest* decision-making in favour of another person who has no right to be awarded a subsidy, or to intervene in the award of grants in relation to a business in which the public official has a personal interest. All of these alternatives are of course covered but the text in Art. 4(4) of the proposed directive may include other circumstances of misappropriation as well, without there being necessarily a specific personal interest involved. On the other hand, no specific offence of *abuse of office* has been added to the proposal. This has been considered a superfluous addition to the offence of *misappropriation*. Similarly, an offence of *breach of professional secrecy* has not been included in the proposal as the conduct is already covered under the disciplinary-law measures of the EU Staff Regulations.

d) Title III of the proposal contains general provisions applicable to the criminal offences set out under Title II. All forms of participation are to be made punishable as a criminal offence (Art. 5(1) of the proposal) but an attempt to commit the criminal offences referred to in Arts. 3 and 4 is only to be made specifically punishable for those offences (fraud and misappropriation) which do not already include within their main definition specific alternatives relating to preparatory conduct

(see Art. 5(2) of the proposal). The provisions on the liability of, and minimum sanction types for, legal persons in Arts. 6 and 9 of the proposal are mainly a *Lisbonisation* of the obligations contained in Arts. 3 and 4 of the Second Protocol to the Convention on the protection of the EU's financial interests. Member States need to take the necessary measures to ensure that legal persons can be held liable for the listed offences but the proposal does not require these measures to include criminal liability of legal entities.

For natural persons, however, the proposal contains specific provisions on the criminal penalties which Member States need to enact in their legislation. As a general rule, the criminal penalties need to be effective, proportionate and dissuasive. In accordance with the principle of proportionality, the proposal refers in Art. 7(2) to minor cases where the damage or advantage is less than € 10,000; in these cases, Member States may opt for sanctions other than criminal ones. For specific cases in which the damage or the advantage involved exceed a threshold of € 100,000, Member States need to provide for criminal sanctions including a minimum penalty of at least 6 months' imprisonment and a maximum penalty of at least 5 years' imprisonment. In cases of money laundering and corruption, this threshold is € 30,000. The objective is to achieve more consistency in the level of sanctions across the EU and to increase the deterrence of the measures in place. The required sanctions of imprisonment are considered proportionate and justified, thus ensuring that a European Arrest Warrant can be issued and executed for any of the relevant offences.

e) Member States shall establish their jurisdiction over the criminal offences of the directive based on the principles of territoriality and active personality. As opposed to the convention (Art. 4(2)) and its protocol (Art. 6(2)), Art. 11 of the proposal for a directive does not allow for a declaration made by Member States in order not to apply their jurisdiction in cases based on the personality principle. Very importantly, the proposal contains in Art. 12 specific provisions on prescription (time limitation) for the investigation, prosecution, trial and judicial decision concerning the offences within the scope of the directive. The proposal refers to a minimum prescription

period of 5 years from the time when the offence was committed (Art. 12(1)) and requires the prescription to be interrupted upon any act of investigation or prosecution until a total of at least 10 years has elapsed from the time when the offence was committed (Art. 12(2)). The enforcement of a penalty imposed following a final conviction needs to be possible for at least 10 years (Art. 12(3) of the proposal).

The proposal also contains specific provisions on the interaction between criminal-law proceedings initiated on the basis of national provisions implementing the directive and the proper and effective application of administrative measures, penalties and fines in the exercise of disciplinary powers by competent authorities against public officials (see Art. 7(3) of the proposal) or the application of administrative measures within the meaning of Council Regulation No. 2988/95 on the protection of the European Communities' financial interests (see Art. 14 of the proposal). The directive when adopted will replace the convention and its protocols. They will be repealed (Art. 16 of the proposal). A provision on cooperation between the Commission (OLAF) and the competent criminal-law authorities of the Member States has been included in Art. 5 of the proposal, which mirrors the provision in Art. 7 of the Second Protocol to the Convention on protection of the European Communities' financial interests, such as to preserve the *acquis* of the third-pillar instruments.

### III. Conclusion

Against the background of a change in the scale of the challenges facing the criminal investigation and prosecution of offences against the EU budget, the European Commission has put forward a proposal for a directive to step up substantive criminal-law protection against fraud. The proposal is to some extent innovative but it is not revolutionary and represents a balanced policy line. It responds to the needs for more effective deterrence in the fight against fraud and for a fully equivalent legal framework throughout the Member States. It suggests matching the level of criminal-law protection to the seriousness of the conduct in question and using synergies with administrative measures for the protection of the EU's financial interests.



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1 O.J. C 316, 1995, p. 48.

2 O.J. C 313, 1996, p. 1 and O.J. C 221, 1997, p.11.

3 COM(2001) 272, 23.5.2001, as amended by COM(2002) 577, 16.10.2002.

4 COM(2004) 709, 25.10.2004 as completed by SEC(2004) 1299 and COM(2008) 77, 14.2.2008 as completed by SEC(2008) 188.

5 See COM(2008) 77, 14.2.2008, point 3.

6 See OLAF report 2011, Table 6 Overview of progress on judicial actions in actions created between 2006 and 2011; see also statistics reported in SEC(2011) 621, 26.5.2011.

7 COM(2012) 363, 11.07.2012.

# A Decentralised European Public Prosecutor's Office

## Contradiction in Terms or Highly Workable Solution?

Dr. Simone White\*

The creation of a European Public Prosecutor's Office seems now to be in sight, at least from an EU-constitutional point of view. However, there appear to be two major stumbling blocks, which can be summarised as austerity and complexity. Within the climate of financial austerity in the EU, the *Zeitgeist* provokes considerations of reduction and economy rather than expansion and creation of new EU institutions on a vertical scale. Finding a politically palatable solution will require not only political will (and/or a sudden event precipitating the need for an EPPO) but will also call for creativity in execution. All the more so, when one considers the complexity of the EU institutional structure and the fast-evolving nature of the European criminal law framework, which deepen the challenge.

From an EU-constitutional point of view, Arts. 85 and 86 of the Treaty on the Functioning of the European Union now appear in the chapter on judicial cooperation in criminal matters of the Treaty on the Functioning of the European Union.<sup>1</sup> They deal with the possible extension of Eurojust's powers<sup>2</sup> and with the conditions for the creation of a European Public Prosecutor's Office (EPPO). The need for the strengthening of Eurojust and for the creation of an EPPO is being argued through position papers and impact assessments. Nilsson<sup>3</sup> comments:

I believe that we will have to make a real impact assessment, and not only an evaluation on the functioning of Eurojust, and in particular see whether there is a need for an EPP in the light of how Eurojust works and how judicial cooperation in the protection of the financial interests of the Union works. Member States will not, at the present stage, be prepared to go through what will be the extremely complex and no doubt very lengthy discussions that will be required before an EPP can start to function, unless a real need has been demonstrated in an unambiguous manner.

Since the original model for European public prosecution was formulated in 1997, European criminal law has progressed. The EU now has a European Arrest Warrant<sup>4</sup> and a European Evidence Warrant,<sup>5</sup> even if the latter is restricted in functionality and has only been implemented by two Member States. A draft European Investigation Order<sup>6</sup> is now on the table to replace the European Evidence Warrant. More convergence is expected with a set of EU procedural rights: it has been argued that harmonisation was necessary to create the conditions of mutual trust necessary for the smooth functioning of mutual recognition. The Charter of EU Fundamental Rights is now

an integral part of the EU Treaty, and the EU is on the road to becoming a party to the European Convention on Human Rights.<sup>7</sup>

Still on the legislative front, a 2011 Communication from the Commission on the protection of the financial interests of the European Union by criminal law and by administrative investigations states that "a reflection will be conducted on the strengthening of the role that bodies at a European level – including OLAF, Eurojust and – alternatively or cumulatively – a possible EPPO may play to better investigate, prosecute and assist in cases of crime at the expense of EU public money."<sup>8</sup> The Communication goes on to say "the European Union stands at a crossroads. Work needs to be undertaken at three levels: procedures, substantive criminal law and institutional aspects." One could argue that these three aspects are indeed developing – European Criminal Law is highly dynamic<sup>9</sup> - but it is in their coordination that the challenge rests.

Efforts to harmonise substantive criminal law are also going forward. There are plans to repeal at least parts of the PIF Convention<sup>10</sup> and its protocols<sup>11</sup> in favour of a directive dealing with substantive criminal law aspects. The original proposal for a directive on the criminal law protection of the Community's financial interests in 2001<sup>12</sup> had argued that the EU Member States were too slow in ratifying the PIF Convention and its protocols and that third pillar instruments needed to be replaced by a first pillar instrument (a directive), despite the limitations inherent in the then Art. 280(4) TEU. It proposed to introduce common definitions for offences such as fraud, corruption, and money laundering. Rules including a duty of the Member States to criminalise certain behaviour and the liability of legal persons were included as well as rules on penalties. This proposal was subsequently heavily amended in 2002.<sup>13</sup> As of 2012, a new comprehensive draft based on Art. 325 TFEU is under discussion.

The Commission believes that the directive would allow for greater amounts of money to be recovered from criminals for the benefit of EU policy making. In addition to this directive, another proposed directive would in time harmonise procedure. Another instrument on administrative and criminal law

cooperation between competent national authorities including OLAF has also been planned for the period leading up to 2013.

Institutional aspects are also evolving. Eurojust has recently been granted more powers and is awaiting a change to its legal framework connected with Art. 85 TFEU. Europol's legal framework has been amended. OLAF's legal framework has been under discussion since 2004. In addition, numerous suggestions have been advanced for the implementation of Arts. 85 and 86 TFEU. Options are therefore open.

Given this policy context, which way(s) forward for an EPPO? This paper argues that, in the implementation of Arts. 85/86 TFEU, a step-by-step approach should be possible. A half-way house between coordination on the one hand, and a vertical, centralised structure on the other, could present a pragmatic and yet effective compromise, which could perhaps be more appealing (or less repulsive) to the EU Member States.

In order to facilitate reflection, three 'scenarios' are summarised in Table 1 below and are discussed in the following sections of the paper. It is clear that many variations of these three scenarios would be possible, but here only ideal types have been retained: horizontal, decentralised, and vertical (see 2). Some legal, research, and historical background is given first.

## I. Two Hats not Better than One? Recalling the Original Proposal for a EPP

The original, classic, and ideal model of a European Public Prosecutor (EPP) can be found in the *Corpus Juris* study, directed by Delmas-Marty and published in 1997<sup>14</sup> as well as in a follow-up study in 2000.<sup>15</sup> In these early studies, a central EPP was envisaged (based on the French prosecuting model), with subordinated, delegated European Public Prosecutors responsible for the investigation and prosecution of EU fraud in the EU Member States.

These delegated prosecutors would wear two hats, in the sense that they would apply national law in national cases but would apply another set of EU-wide substantive and procedural criminal law rules for offences affecting the EU budget found in the *Corpus Juris*. The EPP would be independent from the Member States' governments and would have the authority to act on its own initiative. The procedure for appointment, it was suggested, would be nomination by the Commission and a decision by the Council under qualified majority. The office holder could have a non-renewal term of six years. The follow-up study of 2000, in particular, stressed at length the need to adopt an EPP, *inter alia* because of the complexity of horizontal cooperation, the diversity of competent authorities,

the heterogeneous nature of legal instruments, the diversity of rules of evidence, and the lack of admissibility of evidence obtained abroad.<sup>16</sup> Some of these issues have now been dealt with outside the sphere of the EPP project, through mutual recognition instruments.

The Commission itself first mooted the idea of an EPP in 2000, stating that some harmonisation of criminal law would be necessary, although the proposal was not taken up in the Treaty of Nice. In 2001, a Commission Green Paper on the criminal law protection of the financial interests of the Community and the establishment of a European Prosecutor was published.<sup>17</sup>

The EPP proposal was controversial from the beginning because several Member States felt that such a post would undermine national sovereignty in justice matters. Some also felt that there were problems of accountability and of ensuring a fair trial for the accused and doubted the utility of the post. In 2003, a follow-up report summarised responses from the EU Member States to the Green Paper.<sup>18</sup> At that time, Belgium, Greece, The Netherlands, Portugal, and Spain were in favour of a European Public Prosecutor whilst Austria, Denmark, Finland, France, Ireland, and the United Kingdom were opposed. The remaining Member States, including Germany, Italy, Luxembourg, and Sweden, had their doubts.<sup>19</sup>

In 2005, the proposed Constitutional Treaty contained a provision enabling the Council to set up a European Public Prosecutor by means of a unanimous decision. The remit of the EPP would initially be limited to "combating crimes affecting the financial interests of the Union."<sup>20</sup> However, the proposed Constitutional Treaty never came into force and the wording was amended in the Lisbon Treaty.

The Stockholm Programme mentions the EPPO in its part on criminal law:<sup>21</sup>

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.

The Action Plan of the Stockholm Programme foresees a legislative proposal for a regulation, providing Eurojust with powers to initiate investigations, making Eurojust's internal structure more efficient and involving the European Parliament and national parliaments in the evaluation of Eurojust's activities by 2012.<sup>22</sup> This will be followed by a Communication on the



establishment of a European Public Prosecutor's Office from Eurojust by 2013.<sup>23</sup>

The House of Lords, however, perceived a disparity between the Stockholm Programme and its Action Plan:

The Stockholm Programme was agreed by the European Council in 2009 and the Commission was invited to present an action plan in order to translate the aims and priorities of the programme into concrete points. As is made clear in the Government's explanatory memorandum on the action plan, we believe that there are a number of aspects in which the action plan differs markedly from the agreed Stockholm Programme. It was because of this disparity that the Government signed up to the Council conclusions on the Stockholm Action Plan in June. These conclusions, as you will be aware, propose only those actions that fully conform to the Stockholm Programme. The conclusions in many ways sent a clear message to the Commission: that it should not underline the role of national governments in setting the agenda for the EU work on justice and home affairs by departing from the decisions of heads of government.<sup>24</sup>

In 2010, the European Parliament called on the Commission to consult interested stakeholders, including civil society, on all aspects related to the creation of an EPPO to combat crimes affecting the financial interests of the European Union and to step up the adoption of all necessary measures for establishing this office.<sup>25</sup> The same year, the European Commission presented to the European Parliament's budgetary control committee a reflection paper on the reform of OLAF, which mentioned that the EPPO and the consolidation of the existing anti-fraud legislation needed a thorough impact assessment.

It is clear that any proposal for the creation of a further consolidation of Eurojust and/or the creation of an EPPO should take into account the mutual recognition *acquis*, which did not exist when the *Corpus Juris* study was first conceived. A fresh perspective is needed, obviating the need for the "two hats" approach adopted in the original *Corpus Juris* study.

## II. Three Scenarios for Moving Forward on Arts. 85 and 86 TFEU

### Scenario 1: Reinforced Horizontal Cooperation under Art. 85 TFEU

Art. 85(1) TFEU confirms the horizontal cooperation role of Eurojust. Its mission is to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases, on the basis of operations conducted and information supplied by the Member States' authorities and by Europol. This enshrines Eurojust's role in the Treaty and opens up possibilities:

In this context, the European Parliament and the Council by means of regulations adopted in accordance with the ordinary legislative procedure shall determine Eurojust's structure, operation, field of

action and tasks. These tasks may include: (a) the initiation of criminal investigations, as well as proposing the initiation of prosecutions conducted by competent national authorities, particularly those relating to offences against the financial interest of the Union; (b) the coordination of investigations and prosecutions referred to in point (a); (c) the strengthening of judicial cooperation, including by resolution of conflicts of jurisdiction and by close cooperation with the European Judicial Network. Those regulations shall also determine arrangements for involving the European Parliament and national Parliaments in the evaluation of Eurojust's activities. (Art. 85(1) TFEU)

Art. 85(2) clarifies that, in the prosecutions referred to in paragraph 1, and without prejudice to Art. 86, formal acts of judicial procedure shall be carried out by the competent national officials. Art. 85(2), however, does not indicate the type of relationship there should be between the initiator of criminal investigations and prosecutions related to the financial interests of the European Union and the competent national authorities. The future structure of Eurojust is therefore left open.

### a) "Initiating" Investigations and Prosecutions

Art. 85 TFEU makes it clear that, although Eurojust's general powers may be reinforced as far as coordination and the resolution of conflicts is concerned, it may be granted a power to initiate investigations or prosecutions in the future in relation to offences against the financial interests of the EU. This power is of pivotal importance. One interpretation of Art. 85(a) is that Eurojust would initiate investigations and prosecutions in the area of the protection of the financial interests of the European Union, instructing national judicial officials to carry out formal acts of judicial procedure. A "softer" interpretation might be that Eurojust would consolidate its present possibility to request that judicial authorities should act, as discussed below.

At present, Eurojust may *request*<sup>26</sup> the competent authorities of the Member States concerned, that they should:

- (i) Undertake an investigation or prosecution of specific acts;
- (ii) Accept that one of them may be in a better position to undertake an investigation or to prosecute specific acts;
- (iii) Coordinate between the competent authorities of the Member States concerned;
- (iv) Set up a joint investigation team in keeping with the relevant cooperation instruments;
- (v) Provide it with any information that is necessary for it to carry out its tasks;
- (vi) Take special investigative measures;
- (vii) Take any other measure justified for the investigation or prosecution.<sup>27</sup>

Art. 17(7) of the Framework Decision on the European Arrest Warrant<sup>28</sup> also requires Member States to notify Eurojust



Scenarios	New powers / structure	Institution-building	European Criminal Law	Budget	Possible advantages / disadvantages
<b>Scenario 1.</b> Eurojust reinforced. Art. 85 TFEU (progressive increase of powers, consolidation).	Reinforced coordination by Eurojust	No new institution; Eurojust is reinforced	Continued focus on mutual recognition	Member States administration only from EU budget	Close to the present development path of Eurojust. Politically palatable. But might not be much more effective than current arrangements?
<b>Scenario 2.</b> Decentralised EPPO. Based on national resources (not above them). Horizontal integration. Art. 85 TFEU at first, making progress towards a more centralised model under Art. 86 TFEU possible.	Reinforced cooperation; heads of national authorities are appointed as nationally-based European public prosecutors (NEPPs). At the EU level, they form a college, with a rotating chair. No over-arching "head" at the European level.	"Soft centre" located in Eurojust, with rotating chair	Focus both on mutual recognition and harmonisation	EU budget partly financing EPPOs in Member States and financing rotating chair	Possibly the best basis for operational cooperation. However not widely discussed. Could be seen as a "spoiler" for scenarios 1 and 2.
<b>Scenario 3.</b> Centralised EPPO based on Art. 86 TFEU. Vertical integration. Original Corpus Juris.	Reinforced cooperation. The EPPO appoints certain national prosecutors as EEPs, subordinated to a central European office. Europol and OLAF also work for the central EPPO, staffed by EU officials.	A new, central institution "from Eurojust," financed from the EU budget	Maximum harmonisation of criminal law.	EU budget	Considerable symbolic significance. Political resistance. Not all Member States involved. Queries over effectiveness.

Table 1: Three (linked) scenarios for EU prosecution

whenever they cannot execute a warrant on time. Eurojust can also advise in situations where there are multiple conflicting arrest warrants.<sup>29</sup>

It is not clear how successful Eurojust has been in the past in *ensuring*<sup>30</sup> that an investigation or prosecution be undertaken by a Member State authority, following a request. Zwiers has explored this issue:

Although neither the national members nor the College can properly initiate prosecutions under the Eurojust Decision, the agency's requests cannot be refused by the Member States without them owing an explanation (save for reasons of national security or hampering ongoing investigations). The former Eurojust President called Eurojust an 'empowered' network because of this semi-authority that its requests have. It is also suggested that Eurojust could seek political pressure on uncooperative Member States authorities by including data of compliance with its requests in its annual reports.<sup>31</sup>

Zwiers goes on to add that such requests were rare. In 2007, one request to investigate/prosecute and one request to cede jurisdiction were made by a national member, and one request to cede jurisdiction was made by the College.<sup>32</sup> Perhaps Eurojust should be given more time to develop the practice of ask-

ing Member States to initiate investigations and prosecutions and to monitor their responses through its Annual Report. This could form a useful aspect of reinforced horizontal cooperation (scenario 1).

How easy would it be for Eurojust to actually ensure that investigations or prosecutions are initiated? Eurojust's national members are seconded from the EU Member States. Neither national members nor the College have the power to investigate, prosecute, or bring to trial the suspects of criminal offences with a transnational dimension. This would therefore involve a radical change in Eurojust's relations with the Member States and in its legal framework.

At present, Eurojust has limited powers that can be exercised in urgent cases. Its national members can authorise and coordinate controlled deliveries in their Member State. They can also execute, in relation to their Member State, a request for or a decision on judicial cooperation, including in regard to instruments giving effect to the principle of mutual recognition. This (little used) capacity to act in urgent cases only ap-

plies whenever national members cannot identify or contact the competent national authority in a timely manner.

A national member may set up a Joint Investigation Team in keeping with the relevant cooperation instruments;<sup>33</sup> Eurojust may also do this, acting as a College.<sup>34</sup> National members of Eurojust can also take part in Joint Investigation Teams as a national competent authority or on behalf of Eurojust.<sup>35</sup>

There could be an incremental approach to the initiation of investigations and prosecutions. Nilsson has suggested that Eurojust could be granted a selective power to initiate investigations or prosecutions in urgent cases and/or in cases where a Joint Investigation Team is involved. This would serve to reinforce existing mechanisms and consolidate Eurojust (see scenario 1 in the table). This would also mean that, in the short term, Eurojust would be further consolidated and it would allow for new mechanisms to be tested.

Yet, to formally initiate criminal investigations and prosecutions in a more routine way, one must assume that Eurojust would need to have access to its own criminal investigation resources. At present, Europol only deals with information analysis whilst OLAF, a European Commission Directorate-General, carries out administrative investigations to further the protection of the financial interests of the European Union. Were OLAF investigations and Europol resources to be subordinated to Eurojust, so that it could initiate investigations and prosecutions, Eurojust could then become a type of EPPO under Art. 85 (1) (a) TFEU. It is unclear, however, whether this is what is intended, since Art. 86 TFEU makes provision for the creation of an EPPO from Eurojust on the basis of unanimity.

Given the wording of Art. 85 TFEU, it is also possible to conceive of a Eurojust with reinforced powers under Art. 85(1) (b) and (c) only (as a first step). It would entail a progressive reinforcement of Eurojust with respect to coordination and the resolution of conflicts. The initiation of investigations and prosecutions would be left to a later date – as soon as supporting legislation could be put in place – when this would add value to the function or coordination of criminal investigations and prosecutions currently exercised by Eurojust. The protection of the financial interests of the EU could benefit from a general reinforcement of Eurojust under Art. 85(1)(b) and (c). Eurojust could also start monitoring responses to the requests to investigate or prosecute that it sends to Member States' authorities.

This would be a cautious rather than an adventurous approach, which could leave room for future development, focused on the protection of the financial interests (as shown in scenario 1 in table 1 above), which includes a consolidation in the area of horizontal coordination.

## b) Coordinating Investigations and Prosecutions

A national coordination system has already been set up by Eurojust. National correspondents for Eurojust facilitate the transmission of information and the allocation of work to Eurojust and to the European Judicial Network. The correspondents also assist national members in identifying relevant authorities for the execution of requests for judicial cooperation and maintain close relations with the Europol national unit.<sup>36</sup> This system has only recently been put in place and needs to be put to the test. It could be valuable in urgent cases and perhaps it could be reinforced. For example, it could be envisaged that part of the (rather elaborate) contact point system in existence could focus on the protection of the financial interests of the EU.

Another way in which Eurojust could be consolidated is to provide for OLAF to compulsorily communicate certain cases to Eurojust. The latest draft of amended Regulation 1073/99 proposes that “where this may support and strengthen coordination and cooperation between national investigating and prosecuting authorities, or when the Office has forwarded to the competent authorities in the Member States information giving grounds for suspecting the existence of fraud, corruption and any other illegal activity referred to in Art. 1 in the form of serious crime, it shall transmit relevant information to Eurojust, whenever this information is within the mandate of Eurojust.”

## c) Resolving Conflicts of Jurisdiction

The ninth preamble to the Eurojust Decision states that the role of the College should be enhanced in cases of conflict of jurisdiction – and in cases of recurrent refusals or difficulties concerning the execution of requests for, and decisions on, judicial cooperation.

At present, Eurojust (acting as a College) can resolve conflicts of jurisdiction between two or more Member States in relation to investigations and prosecutions<sup>37</sup> whenever Member States request assistance.<sup>38</sup> Where two or more national members cannot agree on how to resolve a case of conflict of jurisdiction, the College is asked to issue a written non-binding opinion on the case. The opinion of the College is then promptly forwarded to the Member States concerned.<sup>39</sup> Such opinions could become binding in relation to cases affecting the protection of the financial interests of the European Union.

Assuming a continuation of horizontal cooperation, no new institution would be created and Eurojust would continue to be financed according to present arrangements. One advantage would be the introduction of incremental changes and the

possibility of monitoring the responses to such incremental changes from the Member States and OLAF.

Going beyond this, it is possible to envisage a decentralised model under Art. 85 TFEU, which would focus on reinforcing the Member States' capacity to deal with EU fraud.

### Scenario 2: A Decentralised Service under Art. 85 TFEU

Perhaps a flatter structure – more cooperative and (in operational terms) more integrated – could do more to encourage the protection of the financial interests of the EU (scenario 2 in table 1). Such a development could follow on from Scenario 1. Heads of (relevant) prosecution services in the Member States could be designated as the national members of the EPPO (henceforth NEPPs – nationally-based European public prosecutors). They would be given a specific responsibility for the protection of the EU financial interests<sup>40</sup> by their governments (as agreed in the Council of the European Union under Art. 325 TFEU). Such an arrangement would overcome the potential weakness of designating national staff whose members do not have effective command over all the resources that might be needed. The important thing is not to detach the European level from national resources.

Each NEPP would designate a deputy and a staff to hold responsibilities on a day-to-day basis. The latter would maintain face-to-face relations with top-level prosecutors/managers who implement decisions to prosecute. The legal obligation would remain with the NEPPs for investigation and prosecution, which would mean that *all* national resources would have a role to play. This would be in keeping with Art. 85 TFEU, which requires that prosecutions be carried out by national prosecution authorities.

There is no reason why some of the heads, deputies, and staff should not have a desk in a central office (the EPPO in a physical sense). At other times, however, they could communicate with their peers in other Member States via secure telephone messaging systems and – when needed for clarification of issues – by means of video conferencing. The NEPPs would receive some financing from the EU budget to reinforce their action in the fight against EU fraud, as a recognition of the importance of this action in the Member States. A central co-ordination (a 'soft centre') could also be financed from the EU budget. From the point of view of costs, it is possible that some Member States might have less objections to this arrangement than to the financing an EPPO under Art. 86 TFEU.

A central office could share a secretariat with Eurojust and the European Judicial Network, at least initially, and could be

chaired by the EU Member States on a rotating basis. However, the central office would not carry out investigations and would not therefore need to be subjected to judicial review (unlike an EPPO set up under Art. 86 TFEU – see scenario 3 below). As Inghelram pointed out, the requirement for judicial review "is based on the assumption that, in line with Art. 86(2) TFEU, an EPPO will itself be responsible for carrying out investigations, even if coercive measures related to these investigations are carried out by other authorities. Individuals affected by acts performed during such investigations therefore seem entitled, for the purposes of judicial review, to consider themselves affected by acts of the EPPO itself, as a general rule. The situation would be different if an EPPO only had the power to coordinate investigations carried out by others or the power to propose or suggest to other authorities that investigations be carried out."<sup>41</sup>

With a decentralised EPPO, the applicable rules concerning the admissibility of evidence and the procedural review of procedural measures could continue to be the rules adopted under mutual recognition. In that scenario, the adoption of measures, such as the European Investigation Order, would play an important role. But would this be enough to make a difference to the practical functioning of anti-fraud investigations and prosecution?

A decentralised EPPO could be seen more as giving further leverage to the progress already made by mutual recognition. It answers those concerned about subsidiarity and, in the present climate of austerity, it can be seen as being attentive to concerns over costs. Progression to a "vertical" EPPO (scenario 3 in table 1) could be considered with time, based on the progress of NEPPs throughout the EU. If so doing, the EPPO could build upon the NEPPs' experience with investigations and prosecutions using the resources of the Member States.

One objection might be that such an arrangement would have consequences differing little from the present situation, in which – some of those active in Institutions allege – EU frauds are not taken as seriously as national frauds. That, however, would be to misunderstand the situation on two levels.

First, as practitioners know, it is *fraud in general* (i.e. including fraud at the national level) that is not always taken as seriously as other issues. This needs to and can be addressed through the present proposal. By conjoining the prosecution resources applied to national and to EU frauds, and by signalling the political importance of both, more vigorous action would be encouraged on both fronts. This path could have the advantage of highlighting and energising anti-fraud work in general. That could only be for the good, both in operational terms and as a step towards further steps, as outlined above.

Second, any division of operational work into separate agencies, arranged at different “levels,” is simply asking for inefficiency, misunderstanding, and delay. Better to contract the levels into just one; and that is most simply done by building on what is already there.

### Scenario 3: A “Vertical” Office under Art. 86 TFEU

The first paragraph of Art. 86 TFEU states that, in order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted with a special legislative procedure, may establish a European Public Prosecutor’s Office from Eurojust.

“From Eurojust” opens up a number of possibilities. The 2004 House of Lords enquiry on the EPP opined that (a) the EPP should oversee Eurojust; b) that Eurojust itself would take on the role of the European Public Prosecutor; or that the European Public Prosecutor, while a separate body, would join the Eurojust College as an extra member. However, Eurojust’s competence being much wider than the proposed initial competence of the EPP, it seems unlikely that the latter would oversee the former.

Current thinking is as follows:

- (i) The development of Eurojust and the creation of an EPPO could continue in parallel;
- (ii) A step-by-step approach could include initially evaluating the revised Eurojust Decision, exploring further the developments under Art. 85 TFEU, and then discussing the establishment of an EPPO from Eurojust in accordance with Art. 86;
- (iii) Possibly setting up a new institution, only loosely connected to Eurojust.

In any case, there would be a link with Eurojust.

Art. 86 also provides that the Council shall act unanimously after obtaining the consent of the European Parliament. This renders the creation of an EU-wide EPPO unlikely, as some Member States are reluctant and/or would have to opt in and/or submit an EPPO proposal for a referendum. Art. 86 TFEU goes on to say that, in the absence of unanimity in the Council, a group of at least nine Member States may request that the draft regulation be referred to the European Council. In this case, the procedure in the Council would be suspended. After discussion, and in case of a consensus, the European Council would then refer the draft back to the Council for adoption within four months.

It is unclear at present whether there might be nine Member States interested in going forward, although Belgium, Luxem-

bourg, The Netherlands, and Spain have recently expressed interest. The nine-Member-State “reinforced cooperation”-scenario seems the most likely and could proceed on the basis of Arts. 20(2) and 329(1) TEU. This would be contingent on a number of issues being resolved. Nilsson has argued that “setting aside any changes to their own Constitutions (and it is highly likely that nearly all Member States will have to do that) and the complicated procedures to achieve an enhanced cooperation, the Member States will still have to agree on (i) the general rules applicable to the EPPO, (ii) the conditions governing the performance of its functions, (iii) the rules of procedure applicable to its activities (iv) the rules of procedure governing the admissibility of evidence and (v) the rules applicable to the judicial review of procedural measures taken by the EPPO in the performance of its functions.”<sup>42</sup>

Some learned commentators have argued that harmonisation of criminal law needs to go much further in the context of Art. 86.<sup>43</sup> Art. 86(3) states that regulations will determine the general rules applicable to the European Public Prosecutor’s Office, the conditions governing the performance of its functions, the rules of procedure applicable to its activities as well as those governing the admissibility of evidence and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions. The revised proposal for a directive on the criminal law protection of the EU financial interests under Art. 325(4) TFEU may help to make progress on this count.

Another question concerns the articulation of activities of the European Public Prosecutor’s Office with the investigation and prosecution authorities of the Member States and with its EU partners, Europol and OLAF.

### III. Conclusion: Progressive Implementation of Arts. 85 and 86 TFEU

After Lisbon, the debate remains in a state of flux. Suggestions have included the following:

- (i) A progressive transformation of Eurojust, given the existing college and its national members more powers;
- (ii) The creation of an EPPO distinct from Eurojust but using Eurojust expertise;
- (iii) The creation of an EPPO as a specialised unit within Eurojust;
- (iv) A merger of Eurojust and the EPPO, with their respective decision-making mechanisms.<sup>44</sup>

The Bruges Seminar<sup>45</sup> also suggested some other possible combinations: the EPPO could sit in the Eurojust College whenever matters related to the protection of the financial in-

terests of the Union are discussed or nine national members from the participating states could become deputy European Public Prosecutors. The EPPO could also work as a “mini-college.” Suggestions are legion.

This paper has suggested that, in order to make practical progress, two questions need to be untangled: a legal and political question about the relations between Arts. 85 and 86 as well as a question that is not only legal and political but also more practically focused on effective (and cost-effective) use of investigative and prosecution resources.

This paper has argued that Arts. 85 and 86 TFEU allow for the possibility of a staged development of the investigation and prosecution of crimes to the detriment of the financial interests of the EU. Thus, it may be possible to start off with a reinforcement of Eurojust whilst the legal instruments deemed to be necessary for the smooth running of a more centralised structure are being adopted.

Further progress and the adoption of the European Investigation Order, in particular, may then make it possible to extend an Art. 85-based EPPO to an Art. 86-based EPPO with a wider

competence. Art. 86(4) TFEU states that the European Council may adopt a decision extending the powers of the European Public Prosecutor’s Office to include serious crime having a cross-border dimension. The European Council would act anonymously after obtaining the consent of the European Parliament and after consulting the Commission.

Alternatively, action under Art. 85 could move in the direction of a decentralised EPP, constituted by heads of national prosecution services. Designating them as national EPPs (NEPPs) would lend the resources they command to the protection of the financial interests of the EU. Implementing such a strategy would require some thought, especially considering the variations in structure, governance, accountability, and occupational culture of the prosecution services within Member States. However, it might turn out to be a quite direct route towards applying national prosecution (and, by implication, investigation) resources to the protection of EU financial interests. Decentralisation is discussed and indeed implemented in some other areas of EU policy (for example, competition), and there seems no reason not to consider it here, alongside proposals for a centralised EPPO and the “half-way house” that could be offered by Eurojust.

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\* The views contained in this article are not intended to represent those of the European Commission. This paper summarises some of the issues raised at an IALS seminar held on 12 December 2011. Speakers included Aled Williams, Chairman of Eurojust; Peter Csonka, DG JUST European Commission; Professor John Spencer, Selwyn College Cambridge and Chair of the UK European Criminal Law Association; and Professor Katalina Ligeti and Valentina Covolo of the Department of Law at the University of Luxembourg. The author thanks Nicholas Dorn, Jan Ingelram, Lothar Kuhl, and Hans Nilsson for their comments on a draft.

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## L'espace judiciaire pénal européen : une vision se concrétise

Francesco de Angelis\*

**The author analyses the perspective to set up a European Public Prosecutor on the new legal basis provided by the Lisbon Treaty. Such initiative should seek some inspiration from the work done by the various expert groups having produced the "Corpus Juris", so that "legal fiction" can definitely be put into institutional judicial reality in Europe.**

Les débats très vifs sur la création d'un espace judiciaire commun, et tout spécialement les études et les nombreux séminaires organisés à partir de la moitié des années 90 ont finalement porté leurs fruits. Il y a dix ans, les propositions du « Corpus Juris portant dispositions pénales pour la protection des intérêts financiers de l'Union européenne », document dont la première version a été publiée en 1997,<sup>1</sup> ouvrait la perspective audacieuse d'un espace judiciaire pénal commun. L'espace envisagé se fondait essentiellement sur le principe novateur de territorialité unique européenne ainsi que sur la création d'une autorité commune compétente pour la phase précédant le jugement, à savoir le Ministère public européen.

L'idée de l'institution d'un organe commun de l'enquête, ayant compétence à exercer ses fonctions sur tout le territoire européen, a trouvé désormais sa consécration dans le Traité de Lisbonne à l'article 86 du Traité sur le Fonctionnement de l'Union (TFUE). Le Ministère public européen (MPE) n'est donc plus simplement le fruit de l'esprit créateur d'un groupe d'académiques sous l'impulsion de fonctionnaires et parlementaires européens qui auraient poursuivi l'objectif d'une super puissance européenne susceptible d'empiéter sur la souveraineté des Etats et les libertés individuelles. Il a maintenant acquis le rang d'un organe européen : la fiction juridique est devenue une réalité juridique!

## I. Lignes directrices du Traité sur le Parquet européen

L'article 86 TFUE ne crée pas d'emblée le Parquet européen. Il établit néanmoins pour la première fois la base juridique nécessaire pour son institution, qui pourra se réaliser par l'adoption par le Conseil de règlements suivant une procédure législative spéciale nécessitant l'unanimité des Etats membres et l'approbation du Parlement européen, ou par la coopération renforcée de neuf Etats membres. Selon l'article 86§3 TFUE, c'est par ces règlements que l'on pourra établir « le statut du Parquet européen, les conditions d'exercice de ses fonctions, les règles de procédure applicables à ses activités, ainsi que celles gouvernant l'admissibilité des preuves, et les règles applicables au contrôle juridictionnel des actes de procédure qu'il arrête [...] ».

Bien que certains choix essentiels concernant cet organe soient remis à la décision du Conseil – la composition du Parquet européen, son équilibre par rapport aux autorités nationales, son domaine exact de compétence, les pouvoirs qui peuvent lui être attribués, etc. – des avancées indiscutables ont d'ores et déjà été réalisées.

Tout d'abord, le fait de devoir être créé « à partir d'Eurojust », étant donc conçu comme une évolution d'Eurojust (et non pas de l'OLAF), indique clairement sa nature d'organe judiciaire ainsi que son indépendance par rapport aux autres institutions européennes (notamment la Commission) et surtout le fait d'être soumis au contrôle de la Cour de Justice (articles 263 et suivants), comme tout autre organe européen.

Ensuite, l'expression employée pour définir le domaine de compétence du futur Parquet européen – « [...] rechercher, poursuivre et renvoyer en jugement », ainsi que l'exercice de « l'action publique devant les juridictions compétentes des Etats membres » (article 86§2, TFUE) – implique qu'un tel organe soit conçu en tant qu'autorité unique compétente tout au long de la phase préparatoire du jugement, c'est-à-dire depuis la *notitia criminis* jusqu'à l'ouverture de la première audience.

De la même façon, cet organe exerce l'action publique pendant la phase du jugement en tant que représentant de l'intérêt public européen dans la procédure. Ceci implique le choix d'un modèle essentiellement accusatoire où le Parquet est considéré comme le *dominus* de la phase préparatoire, le rôle de la police ainsi que celui du juge devant nécessairement être définis par rapport aux compétences centrales du MPE (la police censée mener l'enquête sous le guide du Parquet; le juge destiné à œuvrer aux côtés du MPE en assurant la garantie judiciaire lorsque des mesures arrêtées par ce dernier affectent les libertés individuelles).

A cet égard, la formulation de l'article 86 paraît sous-tendre l'adhésion au choix fait dans le Corpus Juris. Cet ouvrage est d'ailleurs destiné, par ses propositions de dispositions normatives issues de la réflexion d'experts représentant l'ensemble des familles juridiques européennes – et ayant fait l'objet d'une étude comparée sur sa 'faisabilité' (à savoir sa possibilité de mise en œuvre dans les systèmes juridiques des Etats membres<sup>2</sup> et des Pays candidats<sup>3</sup>) – à fournir un matériel normatif de grande importance et qualité pour la définition des règles communes prévues au §2 de l'article 86.

Bien qu'on puisse sans doute envisager des solutions différentes, l'existence d'un texte comme le Corpus Juris, son autorité et sa renommée constituent un précédent qu'on ne pourra pas oublier ou passer sous silence. Les propositions du Corpus Juris pourront s'avérer une référence essentielle pour la définition exacte des infractions pénales qui tombent dans la compétence du Parquet européen.

## II. Le domaine de compétence du MPE

L'article 86 TFUE indique sans équivoque que la protection des finances européennes est le domaine prioritaire de compétence du Parquet européen, lequel pourra être étendu à d'autres formes de criminalité graves et ayant une dimension transfrontière. Toutefois, l'article 86 TFUE ne définit pas les infractions relevant de la compétence du Parquet européen, lesquelles seront « déterminées » par les règlements constitutifs (telle est l'expression employée par le Traité).

Même si la doctrine n'est pas unanime à ce sujet, une telle expression autorise à établir à partir de l'article 86 TFUE une réglementation établissant des définitions d'infractions pénales européennes communes et directement applicables. Il s'agira d'un premier noyau de droit pénal européen en tant que véritable droit pénal supranational.

Par ailleurs, s'agissant toujours du domaine de la lutte contre « la fraude et toute autre activité illégale portant atteinte aux intérêts financiers de l'Union », le texte de l'article 325 TFUE<sup>4</sup> fournit une base juridique légitimant une intervention de l'Union européenne fort étendue et d'une grande intensité sans exiger l'unanimité requise par l'article 86 TFUE.

Plus précisément, l'article 325 TFUE établit la compétence de l'Union pour édicter, selon la procédure législative ordinaire, « les mesures nécessaires [...] en vue d'offrir une protection effective et équivalente dans les Etats membres [...] », et par là la compétence de l'Union à édicter des mesures d'harmonisation des droits pénaux nationaux. L'objectif d'une protection « effective et équivalente » implique des législations fortement

harmonisées tant pour les comportements incriminés que pour les sanctions. On peut donc affirmer qu'une telle disposition constitue elle aussi la base juridique d'un noyau de droit européen autorisant l'adoption de définitions communes d'infractions pénales européennes directement applicables.

Personne ne peut nier que l'institution d'un Parquet européen, et surtout l'exercice concret de ses fonctions, ne pourra qu'entraîner l'exigence d'un droit pénal commun (quoique limité, au début, à certaines infractions et à certaines règles générales visant par exemple la tentative ou la participation à l'infraction, ou encore l'élément moral, etc.).

Les doutes manifestés par certains auteurs quant à la légitimité de l'adoption d'incriminations communes directement applicables par le Parquet européen sur la base de l'article 325 TFUE peuvent d'ailleurs être aisément dépassés. En effet, il serait paradoxal d'instituer un Parquet européen ayant vocation à exercer ses fonctions sur tout le territoire de l'Union mais contraint à agir selon des législations diversifiées en ce qui concerne les comportements punissables. Cela conduirait en effet à anéantir tout effort de centralisation de l'enquête et de l'exercice de l'action publique aux fins d'une répression efficace et équivalente.

D'ailleurs, lorsque les Etats membres (au moins neuf Etats si l'on adopte la procédure de la coopération renforcée) auront accepté une limitation significative de leurs compétences pénales traditionnellement considérées comme l'expression de la souveraineté étatique en décidant d'instituer un Parquet européen compétent pour exercer l'action publique pour défendre les intérêts européens, ils seront logiquement prêts à accepter l'idée de l'introduction d'un premier noyau d'incriminations communes qui, en fin de compte, seront appliquées par leurs propres juridictions pénales et devant lesquelles le Parquet européen exercera l'action publique. En effet le Traité de Lisbonne n'envisage pas la création de juridictions européennes à ce titre. A l'instar du projet du Corpus Juris, l'idée est donc de laisser la compétence de la phase de jugement aux juridictions nationales.

D'autre part, l'expression employée par l'article 86 pour indiquer le domaine de compétence matérielle du Parquet européen, « les infractions portant atteinte aux intérêts financiers de l'Union », dépasse la seule notion de fraude pour couvrir toute infraction dont la réalisation met en danger les finances européennes. Cela était d'ailleurs le critère retenu par le Corpus Juris pour identifier les infractions communes. Sur la base des articles 86 et 325, il sera donc possible d'adopter des incriminations communes visant, outre la fraude, tant les activités illégales en matière de passation de marchés, de blanchiment et recel des produits ou du profit des infractions affectant les

finances européennes, que les agissements de corruption, d'abus de fonction et de malversation réalisés par les fonctionnaires européens, ou des fonctionnaires nationaux disposant des fonds européens, lorsqu'ils affectent les intérêts financiers de l'Union.

Il est également possible, et même souhaitable, que la compétence du Parquet européen puisse être retenue d'emblée s'agissant des infractions de fonctionnaires, sans qu'il soit nécessaire de constater l'atteinte aux intérêts financiers. En effet non seulement la preuve de la mise en danger réelle des intérêts financiers européens pourrait parfois être difficile à rapporter, mais surtout il serait assez difficile de justifier que des comportements réalisés par des fonctionnaires européens, affectant un intérêt européen fondamental tel que la fonction publique européenne, restent en dehors de la compétence du Parquet européen. Un raisonnement similaire doit être appliqué quant à la protection de la monnaie commune, l'Euro. Il serait en effet inacceptable, après avoir créé une autorité européenne commune, que les infractions affectant la monnaie unique restent en dehors du domaine de compétence du Parquet européen.

### III. Une nouvelle architecture d'espace judiciaire européen

Outre la réflexion sur les compétences du Parquet européen, il importe de se pencher sur la définition d'une nouvelle architecture institutionnelle de l'espace judiciaire européen pouvant assurer l'efficacité du Parquet européen. Celle-ci devra reposer avant tout sur la cohérence et la complémentarité de ses attributions par rapport aux autres autorités européennes, ainsi que sur l'intégration dans les systèmes judiciaires nationaux. Comme l'avait relevé le groupe d'étude du Corpus Juris, l'exigence d'éviter une bureaucratisation excessive et par là l'explosion des coûts de gestion, de même que l'impératif du respect des différentes traditions juridiques, prônent une organisation du Parquet européen autour d'une structure centrale réduite et dont l'exercice des fonctions reposerait essentiellement sur l'activité des autorités nationales d'investigation et de poursuite agissant sous sa direction.

Il serait possible de concevoir un Office central du Parquet européen, sous l'égide d'un Procureur général assisté par un Collège, composé de trois procureurs généraux choisis par rotation au sein des Etats membres, des Directeurs de l'OLAF, Eurojust et Europol, participant à la définition des stratégies du Parquet européen – sans préjudice des prérogatives et compétences de chaque organe dans l'exercice de ses fonctions. D'autre part, les dispositions de l'article 86 selon lesquelles le Parquet européen serait créé « à partir d'Eurojust » devrait

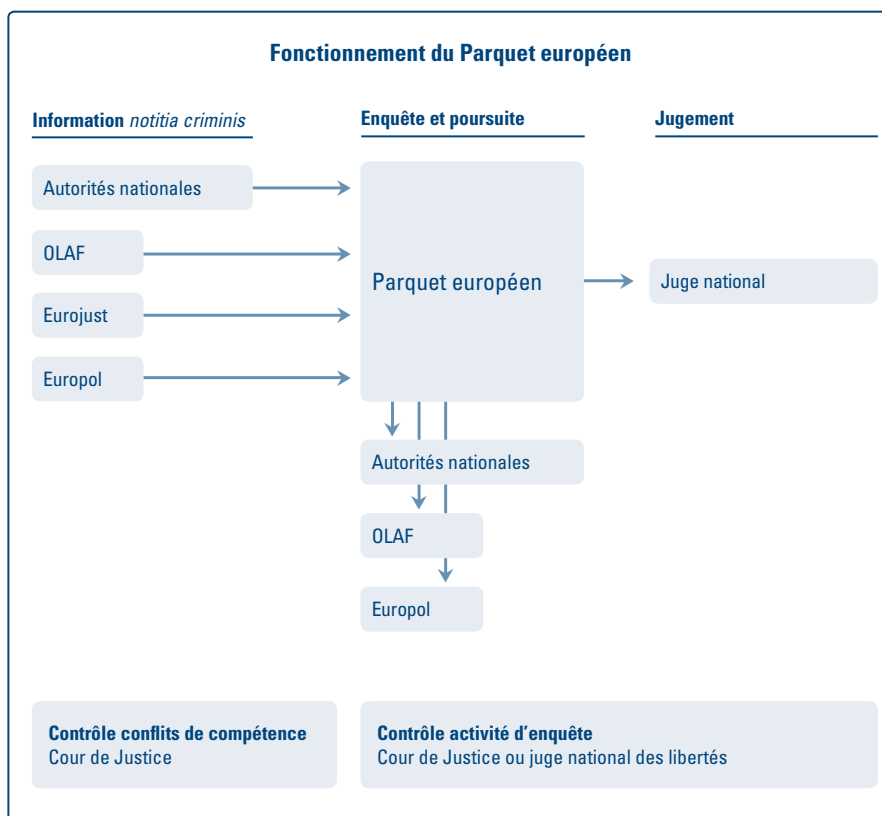
amener à concevoir le Parquet européen comme une unité spéciale d'Eurojust et à attribuer au Procureur général européen le statut de membre d'Eurojust.

Quant à l'OLAF, dont les compétences actuelles concernant les pouvoirs d'enquête administrative seraient maintenues, il pourrait également œuvrer en tant que police spécialisée sous la direction du Parquet européen, représentant ainsi son bras exécutif aux côtés des polices nationales.

Il y a également lieu de résoudre la question fondamentale du contrôle de l'activité du Parquet européen. S'il appartient sans doute à la Cour de Justice de se prononcer sur d'éventuels conflits de compétence, la question demeure ouverte quant au contrôle des mesures arrêtées par le Parquet européen lors celles-ci affectent les droits et libertés individuels. La solution proposée dans le Corpus Juris repose sur la figure du « juge des libertés », c'est à dire un juge national de l'Etat sur le territoire duquel la mesure doit être exécutée, appelé à autoriser l'adoption de la mesure en question, après en avoir appréciée la légitimité. Une solution plus ambitieuse serait d'envisager la création d'une chambre spécialisée de la Cour de Justice.

Cette solution mettrait également en avant la dimension européenne de l'action du Parquet européen. Elle permettrait par ailleurs de dépasser l'objection souvent soulevée relativement à la solution proposée par le Corpus Juris, selon laquelle un juge national ne pouvant pas connaître tout le contexte et les résultats de l'enquête (s'agissant le plus souvent de situations très complexes affectant plus d'un Etat) ne serait pas à même d'apprécier réellement la légitimité de la mesure qu'on lui demande d'autoriser.

Il reste encore du chemin à parcourir. L'introduction de l'article 86 TFUE n'est que le point de départ d'un projet de



longue haleine pour lequel il faut s'engager avec détermination sans délai. Il faut notamment œuvrer pour l'affirmation d'une volonté politique en faveur d'une réelle évolution de la construction européenne par la création d'une institution pénale commune agissant selon des règles communes. Nos efforts n'auront donc pas été vains. Avoir été visionnaires nous a permis, tout en gardant le sens des réalités, d'œuvrer avec passion et enthousiasme à la réalisation d'un objectif ambitieux.<sup>5</sup>

\* Cette contribution a été publiée antérieurement en ERA Forum 2011, 12, pp. 43-48 et il est reproduit ici avec la permission de l'auteur.

1 Corpus Juris, sous la direction de Mireille Delmas-Marty, Economica 1997.

2 La mise en œuvre du Corpus Juris dans les Etats membres, Professeur M. Delmas-Marty, Professeur J.A.E. Vervaele, Intersentia 2000.

3 Enlarging the Fight against Fraud in the European Union: Penal and Administrative Sanctions, Settlement, Whistleblowing and Corpus Juris in the Candidate Countries, Peter Cullen, ERA – Académie de droit européen, 2004.

4 Ancien article 280 TCE. L'on a toutefois éliminé la référence ambiguë à l'exclusion de l'application du droit pénal du champ d'intervention du législateur européen.

5 L'auteur tient à souligner l'apport essentiel des plus éminents pénalistes européens qui pendant de longues années ont participé par des contributions écrites et par des débats passionnants à l'approfondissement de ce thème. Au niveau des Institutions européennes le nom de Lothar Kuhl s'élève au plus au niveau. Il a par sa compétence, par sa persévérance, par son habilité de négociateur, réussi à maintenir 'high in the agenda' un dossier si sensible. L'Europe pénale doit lui être reconnaissante.

**Francesco de Angelis**

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# Naming and Shaping

## The Changing Structure of Actors Involved in the Protection of EU Finances

Dr. András Csúri

### I. Introduction

The idea of a centralised supranational public prosecutor originates from a revolutionary dream of experts envisaged in the renowned *Corpus Juris*<sup>1</sup> project (1997) and its follow-up study<sup>2</sup> (2000). The Treaty on the Functioning of the European Union (TFEU) provided the legal basis for a possible establishment of a European Public Prosecutor's Office (EPPO),<sup>3</sup> and the concept since then has gained further support *inter alia* through the Action Plan of the Stockholm programme. The synergies and effects of academic research and political realism over little more than a decade are readily apparent.

The brief provision provided for in the TFEU, however, can be said to have caused more confusion than clarity. The design of the EPPO as well as the impact of its establishment and its scope of competence on the current EU actors in the field was left unclear. This requires a regular scientific analysis of the subject matter in order to be able to offer well-founded proposals that clarify structures, competences, and provide for more transparency and economy in this field, taking into account the existing investigative and prosecutorial resources.

As several relevant aspects are still uncertain and depend both on future discussions and on EU legislation, this article focuses primarily on *current questions* of the potential future design of judicial cooperation in criminal matters at the European level, following a possible establishment of the EPPO. In the analysis, potential concurrent competences and conflicts of jurisdiction of the present EU actors and the future EPPO shall be identified.

### II. Background

Criminal law on a European level belongs to the most dynamically evolving and transformative fields of European law. The *Corpus Juris* project provided for a set of supranational rules and aimed to establish a common European criminal law understanding.<sup>4</sup> The necessary *harmonisation*, however, became more and more difficult on practical grounds as, since the end of the *Corpus Juris* study, several new states have joined the

Union. Furthermore, starting with the Tampere multi-annual programme (1999), *mutual recognition* was defined as the “cornerstone of judicial cooperation in criminal matters.”<sup>5</sup> It aimed, among other goals, to temper fears over further harmonisation in criminal law, which was thought to “endanger” state sovereignty.<sup>6</sup> Mutual recognition was later confirmed by the Hague (2005) and the current Stockholm (2010) multi-annual programmes and in this way transformed the traditional concept of request-based judicial cooperation.<sup>7</sup>

Nonetheless, *practice* swiftly showed that mutual trust is not automatically given, as neither mutual legal assistance nor mutual recognition were able to overcome the diversity of the European judicial area. Thus, setting up the EPPO would indeed require certain levels of harmonisation (or minimum standards) regarding specific aspects of criminal law and criminal procedure (e.g., the gathering of evidence) to provide a basis for mutual trust.<sup>8</sup> The legal basis for such harmonisation was provided for the first time in Art. 82(2) of the Lisbon Treaty.

Since the *Corpus Juris* project, further relevant *academic* contributions have been undertaken. Among them comparative analyses of different aspects of criminal procedure were provided in the “European criminal procedures” study<sup>9</sup> conducted by Delmas Marty and Spencer as well as in the “Rethinking criminal justice” study<sup>10</sup> and the ongoing project on “National Criminal Law in a Comparative Legal Context” by Sieber at the Max-Planck Institute.<sup>11</sup> The *fiches belges* of the European Judicial Network provides for a further important database. Highly valuable data was gathered and presented most recently in a study conducted by Ligeti, which was based on a comparative analysis of 27 national reports covering general aspects of criminal procedure, the attribution of investigative and prosecutorial powers, and the associated procedural safeguards of the Member States of the Union.<sup>12</sup> The latter study focused primarily on establishing a body of rules with a model character regarding the investigative powers of the EPPO, the applicable procedural safeguards and evidential standards. The results of this study will shape the future understanding of judicial cooperation in criminal matters in Europe and the identification of problematic issues regarding the potential interrelations and competences in this field.



### III. Questions

Ever since the idea of an EPPO emerged, it generated discussion on its status and institutional settings, its scope of competence (solely the Union's financial interests or broader powers related to other serious crimes?), the applicable rules of procedure (common body of rules or equivalent standards?), and potential organisational schemes. Questions were posed about the admissibility of evidence gathered by the EPPO before the national courts (danger of "forum shopping" due to the differing standards in the Member States) and the judicial review of its actions (guarantees and safeguards, which fora, etc.). The prospect of establishing a European Public Prosecutor's Office is however only one facet in the complex field that provides for the adequate protection of the financial interests of the Union. At the horizontal level, Community institutions have been active in the field for quite some time. The most relevant EU actors at present in this area are Europol, Eurojust, and OLAF, the latter already being equipped with investigative powers, if only for administrative matters.<sup>13</sup> This raises questions about the future structural and functional changes within this field, possible synergies, and the overlaps of tasks and competences.

Keeping the above in mind, the assumed *primary added values* of the EPPO (as an investigative and prosecutorial body) may be summarised as being the possibility of vertical judicial cooperation in criminal matters, with a (theoretically) EU-wide competence,<sup>14</sup> and the opportunity to redesign the existing legal framework in a coherent and comprehensive manner. It may operate as a hierarchically structured supranational body within, and conform to, the objectives of the area of freedom, security and justice, embedded in the national legal systems of the Member States.<sup>15</sup> The setup of the EPPO may help to rationalise the current mechanisms, with several EU actors having competence in this field. Questions arise as to what could be a reasonable division of powers between the existing (OLAF, Europol, Eurojust) and the possible future EU actors in the field of protecting the financial interests of the EU? How could possible overlaps be avoided and the extension of competences assisted? Could this reform lead to the merging or to the disappearance of current actors? Should the EPPO necessarily be a completely new institution or would broader and restructured competences of the existing actors satisfy the needs? Which actions of the future EPPO should underlie what judicial review and by whom?

### IV. Analysis

The short provisions in the TFEU – as already mentioned – do not provide for a clear understanding but rather for ambiguity. Therefore, it is essential to identify what is clear and what

seems obscure when reading the provisions of the Treaty. The classification of the problematic issues below is by no means complete. It focuses solely on central issues relevant to the future of EU actors in the field and their potential relations with the EPPO and with each other, respectively.

#### 1. EU Actors with Competence to Protect the Financial Interest of the Union

##### a) Legal Basis

The Treaty provides for the strengthening of Eurojust by the potential extensions of its competence with the right to "initiate investigations [...] particularly, [...] relating to offences against the financial interests of the Union" (Art. 85. (1) a) and c)). At the same time, it argues in support of the *establishment of the EPPO*, which shall be established "from" Eurojust (Art. 86). The Treaty explicitly mentions Europol in several articles but remains silent on OLAF.

##### b) Possible Consequences

Questions immediately arise concerning the future role and status of *Eurojust*, as the phrasing ("from") and the cross references provide for enormous ambiguities. Given its potential future power to initiate *criminal* investigations, Eurojust itself could transform into the EPPO under Art. 85(1)(a) TFEU.<sup>16</sup> A contradictory interpretation, however, may result in the dissolution of Eurojust, namely if the powers of Eurojust are conferred to a completely new institution: the EPPO.

*OLAF's* situation seems unclear, as the Treaty remains silent on the administrative investigation body of the Commission. Nevertheless, Art. 325 TFEU does refer to the key role of the Union (and of the Commission) in combating fraud and protecting the Union's financial interests. Therefore, it is to be assumed that, most evidently for internal investigations, the future EPPO cannot allow the benefits arising from the existing apparatus, practice, and partners of OLAF to be abandoned, whether inside or outside of its institutional framework.<sup>17</sup>

*Europol's* future seems secure, as the Treaty refers to it explicitly in several articles and especially in liaison with the future EPPO (Art. 86 (2)), which will definitely rely on Europol's data compilation.

Accordingly, the competence and future structure of the existing actors will be determined by the method of establishment (unanimous, enhanced cooperation, opt-out), internal structure (centralised, decentralised, college type), degree of (in) dependence, and competences (narrow or broad spectrum) of the future EPPO.

## 2. The Approach to Establishing the EPPO

### a) Legal Basis

The following is clear on the way to establish the EPPO. The Treaty allows for the establishment of the EPPO both by unanimous decision and as an enhanced cooperation<sup>18</sup> of at least nine Member States (Art. 86 (1) TFEU). Additionally, regardless of how the EPPO is established, the Stockholm programme requires the prior thorough implementation of the Council decision on Eurojust by all Member States.<sup>19</sup>

### b) Possible Consequences

Taking into account the complexity of the issue and the different cultural and legal backgrounds provided by the Member States' legislation, not to mention sensitive political considerations, it is hardly imaginable that the EPPO will be established by unanimous decision. The EPPO will therefore presumably be established *by enhanced cooperation*. Consequently, the office will commence its work in a highly complex context, with different actors to coordinate (national judicial authorities, involved or not involved in the "EPPO-cooperation;" EU Member States; and third states). As a result, different legal frameworks will apply (future EPPO rules of procedure, the mutual recognition acquis, other EU instruments, agreements with third states). This starting point will allow for essentially strengthening the future role of Eurojust, taking into account its wealth of experience and existing apparatus in the coordination of judicial cooperation.

The requirement of a *thorough implementation of the Eurojust decision* in the Stockholm programme further raises the question as to whether the EPPO will be established in a parallel or step-by-step manner. The former would mean that the development of Eurojust and the creation of an EPPO would take place in a complementary manner. The latter would allow for the establishment of the EPPO only following further developments of Eurojust under Art. 85 TFEU and subsequent to the implementation of the Eurojust decision.

## 3. Conflicts of Competence

### a) Legal Basis

The Treaty grants the EPPO *concrete* competence for crimes affecting the financial interests of the Union and provides for the possibility to extend these powers to serious crimes having a cross-border dimension (Art. 86 (1) TFEU). Further, the Treaty provides for *general* EU competence to combat fraud and any other illegal activities affecting the financial interests of the Union through deterrent measures that afford effective protection (Art. 325 (1) TFEU).

### b) Possible Consequences

The provisions do not provide for any criteria how to define *serious crimes* within the scope of competence of the EPPO. This would facilitate identifying the synergies and potential conflicts of jurisdictions with current actors. Additionally the Treaty remains silent on whether the EPPO should have complementary or exclusive competence in these cases.

Nevertheless, if the EPPO is to be set up by enhanced cooperation, its competence will at first most likely be limited to crimes against the financial interests of the Union. Such initial restriction of the scope of its activities might also contribute to preventing conflicts of authority with national prosecution services.<sup>20</sup>

The answers to the above questions could once again significantly affect the competences and future of all existing actors in the field of judicial cooperation in criminal matters. Potential different effects may be demonstrated by the example of Eurojust. A *broad and exclusive competence* of the EPPO for serious crimes may weaken Eurojust's position as presently the most important coordinator in serious criminal cases with a cross-border dimension. However, a *complementary competence* could strengthen Eurojust's coordinating role, especially in an enhanced cooperation scenario or if the respective suspect is involved both in crimes against the financial interests of the Union and other cross-border crimes.

## 4. Relationship of the EPPO and the National Judicial Authorities

The circle of relevant actors would be incomplete without attention being paid to the EPPO's relations to judicial authorities at the national level. This is simply one of the decisive reasons why it is so difficult to create an ideal model and rules of procedure for the future EPPO. Within a closed scheme (e.g., EU framework), it is easier to provide for coherence. However, European judicial cooperation in is an interacting, open system with actors at different levels. Whichever way the EPPO would be established (as a clearly supranational body or as a supranational body embedded in national laws), it will unquestionably rely on the support of the national judicial authorities. Therefore, it is to be assumed that it will have a decentralised structure with delegates in the Member States providing for more flexibility.<sup>21</sup>

An important question in this context is whether the *gathered information* will circulate between these actors. Will only the national authorities be obliged to give information regarding a case to the EPPO? What happens with the gathered information if the EPPO decides against prosecution in the respec-

tive case? Could the national authorities gain the information gathered by the EPPO for the purpose of prosecution at the national level?

Additionally *constitutional rights* linked to criminal procedure must be analysed in detail, as proposals breaching constitutional rights may cost the support of the respective Member States for the EPPO.

One of the most sensitive issues with regard to the EPPO's relationship to national judicial authorities is the *judicial review* of its actions. Which acts of the EPPO should underlie what kind of judicial review and via which forum? To demonstrate the complexity of the subject matter, the author makes use of a comparative analysis that he elaborated upon information gathered within the EPPO project. The analysis focused only on the aspect of *judicial assessment of decisions on committing a case to trial* in the Member States.<sup>22</sup>

According to the analysis, the 27 national legislations can be divided into two equal groups on the basis of the judicial review of decisions on committing a case to trial. Only half of the Member States require for a judicial assessment of the decision on pressing charges. This review mostly covers formal (legal) and substantial (evidential) requirements such as obstacles of procedure or whether the indictment is based on sufficient evidence. These assessments mainly result in a) accusation, b) sending back the charges for amendment or c) terminating the case.

As we can see, the judicial assessment of indictments may have the most varied consequences. However, this possibility only exists in half the Member States, which allows us to argue in different ways. If the EPPO's indictment would underlie the judicial review of national courts, it would provide for a higher level of legal certainty (at least for those Member States providing for this possibility). It may, however, force or misguide the future EPPO to engage in "forum shopping," i.e., to choose a state of trial where the indictment will not be subject to the judicial review of a national court.

On the basis of the above comparison – limited to judicial review of indictment and not generally to the activities of the EPPO – it may lead to a proposal for a direct accusatorial competence of the future EPPO *without* further judicial assessments. Even if it provides room for debates – and the example here was presented without any further contextual deliberations – even such a proposal could be founded and justified *upon the current legislation of the Member States* regarding judicial review of indictment.

Finally, the related crucial procedural question of what *forum* shall provide judicial review (essential in regard to the future model of the EPPO) is completely open. Should it take place at the European level (special pre-trial chamber of the European Court of Justice) or at the national level (national judges or centralised national judges especially for this purpose)? On the one hand, such a special chamber of the ECJ does not currently exist; on the other hand, and systematically thinking, one may basically question whether the model of a national court reviewing decisions of even only a partly supranational body is logical in a necessarily hierarchical system?

## V. Conclusions

Based on the above elucidations, the design of the future EPPO and its relations to current EU bodies depend on several interacting factors. It is to be presumed that the final design of the EPPO, with respect to its conferred competences, may decidedly influence (and modify) the present landscape of EU actors in the field of judicial cooperation in criminal matters (and especially in protecting the financial interest of the Union). Therefore, the pros and cons of the different potential models as well as their effects are to be assessed and clearly structured in order to minimise redundant overlaps and ensure efficiency. It is the responsibility of legal academia to analyse all scenarios that would enable the relevant stakeholders to elaborate best possible solutions.

1 Corpus Juris portant dispositions pénales pour la protection des intérêts financiers de l'Union européenne, sous la direction de Mireille Delmas-Marty, Paris 1997. Economica.

2 M. Delmas-Marty/J. Vervaele (eds.), The Implementation of the Corpus Juris in the Member States: Penal Provisions for the Protection of European Finances, 4 volumes, Intersentia, Antwerp 2000.

3 Art. 86 TFEU foresees an EPPO "for investigating, prosecuting and bringing to judgment [...] the perpetrators of, and accomplices in, offences against the Union's financial interests."

4 See also L. Kuhl, The future of the European Union's financial interests. Financial criminal law investigations under the lead of a European Prosecutor's Office, eucrim 3-4/2008, p. 187.

5 Presidency Conclusions, Tampere European Council, 15th and 16th October,

1999, points 33-37. The as yet adopted instruments based on mutual recognition cover *all stages* but only *certain aspects* of criminal procedure. K. Ligeti, The European Public Prosecutor's Office: How Should the Rules Applicable to its Procedures be Determined?, European Criminal Law Review, Vol. 2, 2011, p. 143.

6 K. Ligeti, op. cit., pp. 144-145.

7 The Hague Programme: Strengthening freedom, security and justice in the European Union (2005/C 53/01); The Stockholm Programme – An open and secure Europe serving and protecting citizens (2010 C 115/01).

8 L. Kuhl, op. cit., p. 189.; J. Vervaele, The Shaping and Reshaping of Eurojust and OLAF. Investigative Judicial Powers in the European Judicial Area, eucrim 3-4/2008, p. 184.; V. Mitsilegas, EU Criminal Law 1st ed. Oxford 2009, p. 124; K. Ligeti, op. cit., p. 146.

- 9 M. Delmas-Marty/ J.Spencer (eds.), *European criminal procedures*, Cambridge Univ. Press, 2002
- 10 U. Sieber/M. Wade (eds.), *Structures and Perspectives for European Criminal Justice*, Duncker & Humblot, Berlin (forthcoming 2012).
- 11 U. Sieber et al. (eds.): *National Criminal Law in a Comparative Legal Context*. Berlin, Duncker & Humblot, 2011.
- 12 EU Model Rules of Criminal Procedure for the proposed European Public Prosecutor's Office. *K. Ligeti*, op. cit., pp. 123-148.
- 13 *L. Kuhl*, op. cit., p. 191.
- 14 Problems will arise *in practice* due to the way in which the EPPO will be set up. It has to be assumed that, initially, it will be established by enhanced cooperation between a number of the Member States. Thus, at first the EPPO will not have real EU-wide competence. See also IV.2.b.
- 15 *K. Ligeti*, op. cit., p. 142.
- 16 *Vervaele* describes Eurojust as the "embryo" of the EPPO. *J. Vervaele*, op. cit., p. 185., *Kuhl*, however, excludes a "complete institutional and functional merger whereby Eurojust would fully participate in the powers of the European Public Prosecutor's Office" under Art. 85 TFEU. *L. Kuhl*, op. cit., p. 190. *Ligeti* deduces from the fact that Arts. 85 and 86 TFEU fall under different legislative procedures that the Member States require a higher threshold for the setting up of the EPPO, and she therefore doubts the possibility of a progressive setup of the EPPO from Eurojust. *K. Ligeti*, op. cit., p. 134.
- 17 See also *V. Covolo*, *From Europol to Eurojust – Towards a European Public Prosecutor ... Where does OLAF fit in?* below; *Kuhl*, op. cit., pp. 190-191.

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## From Europol to Eurojust – towards a European Public Prosecutor

### Where Does OLAF Fit In?

Valentina Covolo

Arts. 85, 86, and 88 TFEU opened up a rich debate on the construction of the European criminal law area. What role will OLAF play in the future as regards the possibilities offered by these new legal bases? The question may surprise those who are not familiar with OLAF's activities. Indeed, OLAF carries out administrative, not criminal investigations.<sup>1</sup> Its competences do not cover only offences but, in a wider sense, irregularities adversely affecting the financial interests of the EU.<sup>2</sup> Above all, Regulation 1073/99 explicitly states that OLAF's investigations shall not affect the powers of Member States to initiate criminal proceedings.<sup>3</sup> From this point of view, the question can be restated as a more provocative one: does OLAF fit in the landscape of the European criminal law area?

### I. OLAF as a Link between Administrative Investigations and Prosecution

To answer this question, we first need to establish the relevance of OLAF's activities to the criminal law protection of the EU's financial interests. Regulation 1073/99 is careful to define the administrative character of its investigations. In particular, OLAF is competent to investigate illicit activities committed both by European civil servants and by economic operators when the EU budget is at stake. The first category of cases refers to internal investigations conducted within the EU institutions,<sup>4</sup> while the second covers external investigations.<sup>5</sup> As regards the latter, OLAF inherited from the Commission the power of carrying out on-the-spot checks and inspections

on the premises of economic operators within Member States.<sup>6</sup> To this end, OLAF can avail itself of the same inspection facilities as national administrative inspectors.<sup>7</sup> However, it may only request the assistance of national authorities that are free to take precautionary measures in order to safeguard evidence or to take coercive measures in cases where an economic operator refuses to provide access to premises and documents. Similarly, when investigations indicate that a criminal offence has been committed, OLAF recommends that national prosecuting authorities follow-up the case on a judicial level without obliging them to start prosecution.

Despite the limits on its investigative powers, OLAF's operational activity is intrinsically linked to criminal legislation and law enforcement authorities involved in the fight against fraud. The link is inevitable with regard to the scope of its investigations: as soon as an irregularity<sup>8</sup> constitutes an intentional infringement criminalised by domestic law, it leads OLAF to cooperate with national police and judicial authorities. Regulation 1073/99 also stresses the need to ensure that OLAF's findings could be used to prosecute the case when the circumstances call for it. For this purpose, OLAF forwards to the competent authority a final case report that contains precise allegations, findings, as well as recommendations about the appropriate follow-up.<sup>9</sup> A unit composed of magistrates has been created within the Office with the task of transferring the case file to national disciplinary and judicial authorities. In complex transnational cases, OLAF also cooperates with Eurojust and Europol. In conclusion, OLAF participates even at the very early stage of criminal proceedings.

What does such relevance to criminal law represent in practice? As statistics show,<sup>10</sup> OLAF recommends a judicial follow-up in around 40% of the cases opened. However, the effective prosecution of fraud, which national authorities are asked to ensure, is usually described as the Achilles' heel of the fight against fraud. Between 2006 and 2008, less than 7% of OLAF's investigations led to a judicial decision, whether sentences or acquittals.

However, this figure is not entirely reliable due to the lack of empirical data. First, there is currently no obligation for Member States to inform OLAF of the measures undertaken at the national level. Second, national statistics do not usually distinguish between general fraud cases and those detrimental to the EU's financial interests. Third, fraud itself is defined differently in the various European national systems. Although it remains difficult to assess, the lack of judicial follow-up is the key issue that a European Public Prosecutor's Office (EPPO) may solve. What then is the added value of OLAF?

## II. Added Value of OLAF

First of all, OLAF's know-how provides valuable input as to the design of anti-fraud instruments.<sup>11</sup> The information collected contributes to the development of the anti-fraud policy, legislative measures, and fraud-proofing mechanisms. OLAF's experience may identify aspects that usually hinder a judicial follow-up of fraud investigations, e.g., a behavioural norm that is not punished under domestic law, strict rules of evidence, or simply a national judicial policy that does not consider fraud against the EU budget as a priority. The proposal amending Regulation 1073/99 underlines the importance of the monitoring activity by suggesting that Member States report actions undertaken by national authorities when OLAF recommends to them the follow-up of the case.<sup>12</sup>

Second, the EU budget is a complex and technical field. In order to detect and deal with fraud cases, the competent authorities need to be familiar with the functioning of the European financing system as well as with the methods of fraud. In these cases, OLAF's experience and knowledge could help national authorities in the prosecution of a case. In particular, its officers can testify as witnesses or experts in front of national courts.<sup>13</sup>

Third, OLAF is responsible for coordinating complex fraud cases, including when third countries are involved.<sup>14</sup> Its Europe-wide view is helpful in dealing with cross-border investigations. Thus, the Office can play a crucial role in promoting standards as well as improving cooperation with those States. Since 2008, for instance, an OLAF representative has been posted in China with the aim of ensuring a daily contact with the Chinese law enforcement authorities.

Fourth, its core operational activity consists of exerting autonomous powers of investigation. The director general can independently open a case and decide to carry out an investigation.<sup>15</sup> Thus OLAF's operational activity overcomes to some extent the reluctance that Member States show in combating fraud. On this point, the added value of OLAF has been particularly demonstrated with regard to internal investigations and direct expenditure.

## III. Towards a Comprehensive Approach

Despite its added value, OLAF's work still suffers from significant limitations that may be explained by a range of factors. During its early years, OLAF's resources and time were also employed in closing investigations opened by its predecessor, UCLAF. The accession of new Member States to the EU increased the number of fraud cases tenfold. OLAF must



also rely on national authorities in order to prosecute fraud. Finally, some controversial cases, e.g., the Eurostat case<sup>16</sup> and the Tillack case,<sup>17</sup> brought to light dubious investigating practices. Improving the effectiveness of investigations, reducing their length, guaranteeing the rights of persons under investigation as well as those of informants and whistle blowers has increased OLAF's accountability: these are the objectives the proposal amending Regulation 1073/99 intends to achieve.<sup>18</sup>

While the reform of the procedural framework is a necessary and significant step forward, it is not sufficient to achieve the efficiency of anti-fraud investigations. OLAF still faces differences between national substantive law and procedure, difficulties in cooperating with national authorities. Accordingly, OLAF's activities should also be analyzed as regards the entire construction of the European criminal law area. This is all the more important insofar as its competences overlap those of other supranational agencies. Compared to Europol's activity, OLAF analyses trends and methods used to commit fraud.<sup>19</sup> Compared to Eurojust's role, OLAF also interacts directly with national judicial authorities. The overlapping tasks allocated to the three bodies leads OLAF, Eurojust, and Europol to work together. Therefore, the more consistent the European criminal law area would be in conferring to each body powers and tasks, the more successful their cooperation would be.

This may seem obvious. However, the three actors were created in a piecemeal fashion.<sup>20</sup> After Europol, Eurojust, and OLAF were created, the main concern was to ensure cooperation with national authorities. Policy-makers did not pay much attention to the relationship between the EU bodies. Nevertheless, the protection of EU financial interests falls within the competences of each of them. As a result, while the tasks of Europol, Eurojust, and OLAF overlap, they encounter difficulties in cooperating together. The lack of cooperation between OLAF and Europol is a prime example.

#### IV. Lack of Cooperation between OLAF and Europol

Europol was established for the purpose of improving police cooperation between the Member States and thus collaborates with the same law enforcement authorities OLAF liaises with. Its activity consists of collecting, storing, and processing intelligence Europe-wide in order to facilitate the exchange of information between competent authorities of the Member States. Thus, OLAF may anticipate that the possibility of sharing intelligence with Europol would be invaluable for its investigations.<sup>21</sup> According to the Europol decision, Member States agreed that there is a necessity for the European Police Office to establish and maintain cooperative relations with the European institutions, including OLAF. Europol and OLAF

signed an administrative agreement to this end in 2004.<sup>22</sup> The agreement has the objective of organizing the exchange of strategic information, intelligence, and technical information in areas of common interest.

Nevertheless, the cooperation between OLAF and Europol is surprisingly limited.<sup>23</sup> A first explanation can be found in the activities both institutions perform: Europol's work focuses on gathering and analysing information, whilst OLAF also has the power to independently open and conduct investigations. Moreover, in the late 1990s, part of the Commission still had the idea that Europol was more interested in combating drug trafficking and terrorism than wider EU fraud cases. Recently, the joint operation Diabolo II demonstrated how cooperation between supranational bodies can lead to successful results through cooperation on customs issues.<sup>24</sup> The operation was coordinated by OLAF, with the support of Interpol and Europol, which enables cross-checking of information provided by national custom authorities. While such an example proves that a closer and more frequent cooperation between OLAF and Europol is feasible, the current legal framework still prevents them from exchanging personal data – OLAF and Eurojust already communicate this kind of information to each other. The ongoing discussion launched by the Commission on data protection rules could be an interesting starting point for exploring the issue by adopting appropriate standards of data protection.

#### V. Improving the OLAF-Eurojust Partnership

The situation is slightly different with regard to Eurojust. OLAF and Eurojust are empowered with overlapping tasks: both bodies may intervene as contact points for national prosecution and law enforcement authorities when they deal with cross-border criminality adversely affecting the EU budget. Indeed, OLAF not only provides the national judicial authorities with input necessary to start prosecution when it actively exerts its powers of investigation. When investigations are carried out at the national level, OLAF may also intervene in order to ensure coordination by facilitating the exchange of information between the national authorities involved (so-called "coordination cases").<sup>25</sup> It can further provide the Member States with assistance when the competent national authorities carry out criminal investigation (so-called "criminal assistance cases").<sup>26</sup> For these purposes, OLAF is in direct contact with national police and judicial authorities.

Instead of encouraging cooperation, the overlap between Eurojust and OLAF's tasks led first to antagonism.<sup>27</sup> No sooner was the former created as a provisional unit in 2001 than the latter appointed a magistrate's unit with the purpose of liaising

directly with national judicial authorities. Eurojust regretted that OLAF was not informing the agency at an early stage about the cases the Anti-fraud Office transmitted to national judicial authorities, while OLAF felt that fraud was an issue which did not have the same level of priority as terrorism or organised crime for Eurojust. The competition between the two bodies may also be due to the fact that they embodied different models of European integration in the field of criminal law: OLAF as a communitarian and Eurojust as an intergovernmental response for coordinating prosecution Europe-wide. We should not forget that the EPPO was first conceived on the basis of Art. 280 TEC (the same legal basis used later for the establishment of OLAF), whilst Eurojust was originally perceived as rival to the EPPO.

Against this political background, OLAF and Eurojust signed a Memorandum of Understanding in 2003,<sup>28</sup> which was replaced by a new agreement in 2008.<sup>29</sup> The two bodies shall inform each other on any case of common interest, exchange all necessary information within the limits of confidentiality and data protection rules, and coordinate the assistance activities they offer to national judicial authorities. For this purpose, the agreement defines a procedure for exchanging case summaries in order to identify the situations in which cooperation is suitable. The exchange of information concerns both strategic and personal data. On this point, the agreement contains some specific provisions that regulate the security of documentation, data communicated, and the rights of data subjects. However, the issue still raises difficulties. First, there is the need to comply with confidentiality of judicial investigations regulated at the national level. Second, the current European legal framework is split into different standards of data protection inherited from the former pillar structure. The adoption of a comprehensive legal framework as suggested by the Commission may clarify the situation, as regards both enhancing the transfer of personal data and clarifying the rights of individuals. Finally, OLAF and Eurojust meet regularly and have the possibility to set up operational liaison teams consisting of their respective staff.

Nonetheless, there is still room for improvement. Only five cases were officially communicated to Eurojust by OLAF between 2004 and 2009, and, even if the bodies share information about cases of potential interest, only a few investigations led to a real follow-up.<sup>30</sup> Recent developments still show the common will of OLAF and Eurojust to collaborate closely. The need for cooperation is expressly mentioned in Art. 26 of the 2009 Eurojust decision.<sup>31</sup> The possibility of negotiating a new cooperation agreement is also taken into consideration.<sup>32</sup>

Such a renewed interest is clearly fostered by the key role Eurojust will play according to the new treaties. In 2012, the

Commission plans to present a regulation proposal, with the aim of empowering Eurojust to initiate criminal investigations.<sup>33</sup> Above all, Art. 86 provides a legal basis that allows for the creation of an EPPO, which may be competent to deal with criminal offences adversely affecting the EU's financial interests. While OLAF often complains about the reluctance shown by some Member States to start criminal prosecution, it can reasonably expect an effective judicial follow-up of its investigations by strengthening the partnership with Eurojust. The implications go even beyond cooperation if an EPPO is established.

## VI. OLAF and a European Public Prosecutor

According to Art. 86 TFEU, the EPPO shall be responsible not only for prosecuting and bringing to judgement but also for investigating perpetrators of offences against the EU's financial interests. The latter task overlaps with OLAF's mandate to carry out investigations related to irregularities that might also constitute criminal offences. Therefore, could OLAF's role be sustained even after the setting-up of an EPPO? The elimination of OLAF has to be taken into consideration, all the more so as it is mentioned neither by the new treaty nor in the Stockholm programme. But some authors have painted a much more optimistic picture. The question arises as to whether OLAF might be given judicial investigation powers it could exert under the direction of the EPPO.<sup>34</sup>

Transforming OLAF into a sort of European police unit will certainly provoke fierce criticism by some Member States. Let us assume that such a solution would be chosen: does the treaty provide decision-makers with a legal basis for assigning judicial investigative powers to OLAF? *De lege lata*, OLAF is established on the basis of Art. 325 TFEU. In its new formulation, the last sentence of the former Art. 280 TCE was omitted, which prevented the European legislator from adopting on that basis measures concerning the application of national criminal law or the national administration of justice. However it would be difficult to argue that empowering OLAF with judicial investigative powers falls within the scope of Art. 325, whilst Art. 86 specifically aims at empowering the EPPO with judicial powers including those for the pre-trial investigation phase. Consequently, Art. 325 merely allows for administrative investigations. In addition, it is worth noting that Art. 85 states that Eurojust can request prosecution on the basis of operations conducted and information supplied by the Member States' authorities and by Europol. No mention is made of OLAF or any other investigative body.

The sole possibility for OLAF to gain criminal investigation powers is to become an investigative unit of the EPPO. Art. 86 is rather vague, however, concerning any powers the EPPO

would have, and it does not explicitly refer to any type of European police taskforce. Assuming that OLAF becomes such a unit acting under the lead of the EPPO, what would its scope of competences cover? On the one hand, if OLAF continues to carry out external investigations, it risks entering into competition with national police authorities. On the other hand, some authors stress the added value of internal investigations that OLAF could carry out even as a unit of the EPPO. Ultimately, OLAF will be detached from the European Commission and act under the direction of the EPPO. Such a solution would ensure both its full operational independence and its reliability, as long as judicial review of its acts is ensured through judicial control over the EPPO.

## VII. Towards Institutional Reforms

Having identified the complementary and overlapping tasks allocated to the EU bodies, we shall now consider OLAF's institutional reforms. After the first proposal modifying Regulation 1073/99, different solutions were already pointed out.<sup>35</sup>

The first scenario retains OLAF as a separate entity. As long as OLAF continues to be based on Art. 325 TFEU, it will remain in charge of administrative investigations. What could then change? Recently, President Barroso asserted in the political guidelines for the next Commission that OLAF must be given full independence outside the Commission.<sup>36</sup> Indeed, from an administrative point of view, OLAF is part of the European Commission. It only enjoys independence as regards its investigative activities. One may, however, question the wisdom of this semi-autonomous status. In particular, the large majority of internal investigations precisely involves the Commission. The latter takes the initiative in suggesting a list of candidates for the position of OLAF's Director-General and, ultimately, OLAF is still subject to its evaluation. All these aspects raise doubts as to its full impartiality.<sup>37</sup> A possible solution would be to give OLAF the status of a European inter-institutional office according to Art. 174 of Regulation 1605/2002.<sup>38</sup> In this case, the OLAF units participating in the design of legislative instruments would remain part of the Commission. However, this scenario does not help us as regards the relationship between the EU bodies involved in the fight against fraud. The protection of the EU's financial interests will still be problematic in the face of overlapping tasks, the duplication of efforts, and wasted resources.

A second scenario puts special emphasis on the synergies that link OLAF with Europol. The merger between the two bodies was suggested in a notable report from the French Parliament<sup>39</sup> and further analysed by the House of Lords in 2004.<sup>40</sup> In order to rationalise the current system and consequently

increase its coherence, Europol and OLAF may form a single agency responsible for gathering and analysing strategic intelligence to which national police authorities would address their requests. The question of sharing information between two separate bodies would consequently disappear. There is, however, a clear gap in the competences of the two bodies: while OLAF enjoys operational powers of investigation, Art. 88 of the TFEU only confirms Europol's role as an intelligence agency. The provision expressly states that the application of coercive measures shall be the exclusive responsibility of the competent national authorities. Should OLAF become part of Europol, it would not be empowered with investigating powers. Consequently, we shall also consider the possibility of bringing OLAF closer to Eurojust.

For this purpose, the third scenario aims at foreseeing the role of OLAF in assuming that an EPPO is emerging from Eurojust. However, many questions still remain unanswered: what exactly does establishing it "from Eurojust" mean; would it be specifically responsible for prosecuting fraud and corruption detrimental to the EU's financial interests or, in a broader sense, serious transnational crime; what kind of powers will it have; would it be a decentralised body or a fully supranational one? All these questions open up a plethora of possibilities that will influence the future of OLAF. Concerning the "optimistic" institutional reform we have already described, OLAF would become an investigative unit of the EPPO. Its status could then be defined as an auxiliary of justice<sup>41</sup> that would provide the EPPO with its expertise capacity. According to some authors, it would even be possible to afford OLAF certain investigative powers by placing it under the responsibility of the EPPO.<sup>42</sup> Minor fraud cases involving European civil servants would be subject to disciplinary proceedings carried out by the Investigation and Disciplinary Office of the Commission (IDOC). However, this scenario tends to reproduce at the supranational level the functioning of a continental criminal justice system in which a judicial body holds the responsibility for investigations with the power of issuing instructions to the investigating police. The ongoing discussions about the implementation of Art. 86 indicate that this is far from being the only model by which to establish an EPPO.

These observations lead us to a last scenario. The EPPO would certainly provide fraud and corruption cases with a more effective judicial follow-up insofar as it would be responsible for deciding on the committal proceedings. In this case, it would be difficult to further sustain the role of OLAF. This is why its elimination as an administrative investigating office must also be considered. Nevertheless, it is worth mentioning that the legislator might choose to enhance the powers of Eurojust instead of implementing Art. 86 TFEU. Again, the upcoming developments will serve to guide the discussion.

## VIII. Conclusion

In conclusion, the ongoing debate on the implementation of Arts. 85 and 86 of the new treaty offers the opportunity to re-think the entire architecture of the European criminal law area as well as the future of OLAF. The current uncertainty enables us to consider different solutions: full independence of OLAF outside the Commission in the short term, a merger of OLAF with Europol, OLAF as an investigative unit of the EPPO, or simply OLAF disappearing in the long term. Its institutional

reform can provide us with a possibility for clarifying its role and recognising it as a full actor in the European criminal law area. Nonetheless, such reform must not be twisted by the political objective to increase the EU's competences in criminal matters. We should not forget that civil and administrative law mechanisms could also be used as effective tools to tackle fraud.<sup>43</sup> Only this approach will prevent decision-makers from putting the institutional reform of OLAF in a sort of "fly bottle" where European anti-fraud policy is no longer able to consider any other solution than criminal law.



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