



Focus: The European Public Prosecutor's Office

Dossier particulier: Le parquet européen

Schwerpunktthema: Die Europäische Staatsanwaltschaft

The Establishment of the European Public Prosecutor's Office. The Road from Vision to Reality
Peter Csonka, Adam Juszcak and Elisa Sason

The European Public Prosecutor's Office – More Effective, Equivalent,
and Independent Criminal Prosecution against Fraud?
Dr. Lothar Kuhl

The Hybrid Architecture of the EPPO. From the Commission's Proposal to the Final Act
Alexandre Met-Domestici, PhD

Cross-Border Crimes and the European Public Prosecutor's Office
Fabio Giuffrida

Repercussions of the Establishment of the EPPO via Enhanced Cooperation.
EPPO's Added Value and the Possibility to Extend Its Competence
Costanza Di Francesco Maesa

The Associations for European Criminal Law and the Protection of Financial Interests of the EU is a network of academics and practitioners. The aim of this cooperation is to develop a European criminal law which both respects civil liberties and at the same time protects European citizens and the European institutions effectively. Joint seminars, joint research projects and annual meetings of the associations' presidents are organised to achieve this aim.

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Imprint

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Guest Editorial

Dear Readers,

A strong European Union budget, particularly its sound and correct implementation, is a key element in building trust among European citizens. The resources at the disposal of the EU need to be properly managed and well spent in order to make a real difference in people's lives. Ensuring that these resources are not the object of fraud or corruption is therefore an essential objective.

The adoption by the Council of the Regulation establishing the European Public Prosecutor's Office (EPPO) on 12 October 2017 marks a decisive step in this direction. The EPPO will be established by way of enhanced cooperation between (initially) 20 participating Member States, and others may join in the future. The EPPO will be a crucial element in the fight against fraud to the Union budget and become an essential part of the existing legal architecture for the protection of the Union's financial interests.

Under the current system, criminal investigations into cases of fraud are exclusively within the remit of the Member States. At the EU level, administrative investigations are carried out by the European Anti-Fraud Office (OLAF), which refers the results of its activities to the Member States' judicial authorities for follow-up, should there be any indication of criminal activity. This reliance on Member States' criminal investigation powers has proven to be unsatisfactory as regards effectiveness. Difficulties arise because of the differences in the legal systems of the Member States and from starkly uneven levels of follow-up by national authorities on allegations of fraud affecting the Union's finances. Furthermore, criminal investigations are more difficult in cases of cross-border offences, which is often a characteristic of these types of fraud.

The main aim of the EPPO is to establish an effective and coherent European system for the investigation and prosecution of criminal offences affecting the Union's financial interests and to target particularly the most serious forms of crime against the EU budget. This role will put the EPPO at the heart of the ongoing process for the creation of a truly European Area of Freedom, Security and Justice, as warranted by the Treaties.



Günther H. Oettinger



Věra Jourová

The EPPO will be a key player in the protection of the EU budget, as it will be uniquely equipped to carry out criminal investigations and prosecutions of crimes affecting the EU budget, such as corruption or fraud involving EU funds or cross-border VAT fraud, and to bring these crimes before competent national courts. The EPPO's specialised expertise, indispensably needed in complex criminal investigations as well as its European perspective in tackling the crimes mentioned, will help overcome the current fragmented national approach. Since it will be a single office operating across all participating Member States, the EPPO will be in a privileged position to process and exchange information in a more efficient manner than was possible until now for national authorities, each of them acting within the limits of their respective jurisdiction. Moreover, the EPPO will be able to conduct cross-border investigations without the limitations of the current mutual legal assistance instruments.

Following its own European investigation and prosecution policy, the EPPO will work in close cooperation with the competent law enforcement and judicial authorities at the national level. It will also benefit from harmonised definitions of the criminal offences concerned, as provided in the recently adopted Directive (EU) 2017/1371 of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, which is in the process of being transposed by the Member States bound by it.

The EPPO's action will be guided by high standards of protection of the rights of the persons involved in its investigations, by means of the guarantees provided for in both national procedural law systems and in EU instruments (i.e. the Directives on procedural rights of persons suspected or accused in criminal proceedings).

In order for the EPPO to be able to carry out its mandate with a high degree of efficiency, it will establish a strong cooperation with the relevant Union bodies and offices that are active today in the field of the protection of the EU budget. It will especially cooperate with OLAF, which will operate in full synergy with the EPPO to ensure a homogenous level of protection of the EU budget in all Member States. Strong cooperation will also be established with Eurojust and Europol. The flow of information between these actors, both for operative and for analytical purposes, will be a major asset in stepping up the fight against fraud and contribute to a more comprehensive approach in protecting the Union budget.

Now that the adoption process for the EPPO's founding legal framework has been successfully finalised, it is time to look at the challenges that lie ahead in setting up this body. The

European institutions and the Member States will be required make the best efforts to ensure that this phase proceeds swiftly and efficiently, in order to allow EPPO to begin performing its duties rapidly. Once operational, a strong cooperation with European institutions and competent national authorities will be a key element to maximise the EPPO's effectiveness in identifying criminal activities.

A strong, independent, and efficient European Public Prosecutor's Office will be a fundamental step ahead in our efforts to protect European taxpayers' money, by ensuring a truly European approach to the criminal investigation and prosecution of criminal acts committed by fraudsters and criminal organisations who target these resources. Protecting the EU budget means protecting European citizens' money and interests – every cent needs to be spent for their benefit.

Günther H. Oettinger
Commissioner for Budget & Human Resources

Věra Jourová
Commissioner for Justice, Consumers and Gender Equality



European Union*

Reported by *Thomas Wahl (TW)* and *Cornelia Riehle (CR)*

Foundations

Fundamental Rights

Council Conclusions on Application of EU CFR in 2016

On 12 October 2017, the JHA Council adopted conclusions on the application of the EU Charter of Fundamental Rights (CFR) in 2016. The Council looked favourably on the two reports issued by the Commission and the Fundamental Rights Agency in May 2017 (see *eucri* 2/2017, pp. 54-55), which took stock of the progress made and the challenges ahead regarding the effective application of the CFR in the EU.

The Council acknowledges that the protection of fundamental rights is a horizontal issue affecting all areas of EU policy, which needs the support of all stakeholders at both the EU and national levels. The Council also affirms the importance of awareness-raising at the national and EU levels by policymakers, legal practitioners, and the rights-holders themselves. In this context, it underlines the need for enhanced use of digital tools, e.g., the e-Justice platform.

Furthermore, the Council stresses its commitment to further strengthening the coherence between the internal and external dimensions of EU fundamental and human rights policy. It acknowl-

edges the important roles of the Court of Justice of the European Union, the Fundamental Rights Agency, and civil society organisations in making the Charter rights reality.

The conclusions also refer to the following specific policy areas:

- Internal security;
- Asylum and migration;
- Rights of the child;
- Combating racism and xenophobia;
- Violence against women;
- Media pluralism.

In the context of internal security, the JHA Ministers reiterated that security and respect for fundamental rights are consistent and complementary policy objectives. The Council also underscores the importance of the right to privacy and the right to the protection of personal data in the upcoming discussions on the interoperability of EU information systems (see for the latter, *eucri* 2/2017, p. 72).

Lastly, the Council also makes a statement on the accession of the EU to the ECHR. It stresses its commitment to the EU's accession, but it will make further considerations after the Commission had finalised its analysis on the Opinion 2/13 of the CJEU, which took a generally negative standpoint on the accession. (TW)

► *eucri* ID=1703001

Ongoing EU Conflict with Poland Regarding Independence of the Judiciary

The European Commission continues to take action against Poland, where fundamental values of the Union are being eroded by several laws on the judiciary.

First, the Commission issued a Rule of Law Recommendation on 26 July 2017, in which it substantiates concerns about the independence of the judiciary in Poland and the increase of a systematic threat to the rule of law because of four recent legislative acts adopted by the Polish Parliament. According to the Commission's assessment, these laws structurally undermine the independence of the judiciary in Poland and have an immediate and very significant negative impact on the independent functioning of the judiciary.

Grave misgivings concern the introduced mechanism to dismiss or force the retirement of the Supreme Court judges. Another unresolved issue that remains is the lack of an independent and legitimate constitutional review in Poland.

The Commission requested that the Polish government addresses the concerns outlined within one month and that it informs the Commission of the steps taken. At the same time, the Commission warned Poland that it is ready to trigger the mechanism set out in Art. 7 para. 1 TEU, which allows the Council (acting by a four-fifths majority of its members after obtaining the consent of the European Parliament) to determine the clear risk of a serious breach by a Member State of the values referred to in Art. 2 TEU.

* If not stated otherwise, the news reported in the following sections cover the period 1 July 2017 – 15 October 2017

Triggering the “Article 7 mechanism” could – after a slow and laborious process – lead to sanctions against a recalcitrant Member State, in particular by depriving it of its voting rights. The “Rule of Law Framework” is a new supervision mechanism that was created by the European Commission in 2014: through dialogue with the Member State concerned, its aim is to prevent triggering of the mechanisms of Art. 7 TEU, which is intended to be a last resort only.

For further information on previous actions of the Commission against Poland regarding rule-of-law violations, the “EU Rule of Law Framework” and the Art. 7 procedure, see also eucrim 3/2016, p. 122.

In parallel, the Commission made use of legal instruments of EU law to eliminate threats to the rule of law in Poland by initiating infringement procedures. The Commission particularly eyes the new Polish law on the organisation of ordinary courts. On 29 July 2017, the Commission sent a Letter of Formal Notice to Poland – the first step in the infringement procedure. In the letter, the Commission identifies the introduction of a different retirement age for female judges (60 years) and male judges (65 years) as not being in line with the EU’s anti-discrimination law (Art. 157 TFEU and Directive 2006/54 on gender equality in employment). Furthermore, the Commission criticises that the Minister of Justice was given discretionary power to prolong the mandate of judges who have reached retirement age, as well as to dismiss and appoint court presidents, which violates court independence according to Art. 19(1) TEU in combination with Art. 47 of the EU Charter of Fundamental Rights.

The Polish government replied to the Formal Notice on 31 August 2017. The Commission, however, upholds its arguments that the current Polish law on the organisation of ordinary courts does not comply with EU law. As a consequence, the Commission launched the second step of the infringement procedure by

sending a Reasoned Opinion to Poland on 12 September 2017.

The Polish authorities now have one month to take the necessary measures to comply with this Reasoned Opinion. If the Polish authorities do not take appropriate measures, the Commission may decide to refer the case to the CJEU. Then, the judicial stage of the infringement procedure would start. (TW)

► eucrim ID=1703002

Reform of the European Union

Juncker’s 2017 State of the Union Address Includes Reform Roadmap

On 13 September 2017, European Commission President *Jean-Claude Juncker* held his annual speech on the State of the Union before the Members of the European Parliament in Strasbourg. In his speech, *Juncker* took stock of the Union’s achievements over the past year, set the priorities for the year ahead, and outlined how the Commission will address the most pressing challenges the EU is facing. The speech kicked off the dialogue with the European Parliament and Council in preparation for next year’s Commission Work Programme.

The speech also addressed a number of items with relevance to European criminal law and PIF:

- Better protecting Europeans against *cyber-attacks*: The Commission proposes new tools, including a European Cybersecurity Agency;
- Upholding the value of the *rule of law* within the EU. In this context, the final jurisdiction of the European Court of Justice must be respected by all. In addition, undermining the independence of national courts must be stopped, because it strips citizens of their fundamental rights. The Union is a community of law in which the rule of law is a must. Furthermore, accession candidates must give priority to the rule of law, justice, and fundamental rights in their negotiations;
- Strengthening the EU’s external bor-

ders also means immediately extending the *Schengen* area of free movement to Bulgaria and Romania; Croatia will become a full Schengen member once all criteria are met;

- The European Council moving from unanimity to qualified majority voting in certain *tax* matters (decisions on the common consolidated corporate tax base, on VAT, on fair taxes for the digital industry, and on the financial transaction tax);

- Stepping up the fight against *terrorism*: Despite real progress in the past three years, there is still a lack of means to act quickly in case of cross-border terrorist threats. Therefore, a European intelligence unit should be set up to ensure that data on terrorists and foreign fighters are automatically shared among intelligence services and with the police. Furthermore, the new European Public Prosecutor’s Office (EPPO) should be tasked with prosecuting cross-border terrorist crimes;

- Improving regulation: Reducing new legal initiatives and setting up a “Subsidiarity and Proportionality Task Force” as of September 2017. The latter is designed to ensure that the EU acts only where it adds value.

Juncker also fed the debate on the future of the EU by outlining his vision on how the Union could develop by 2025. In this context, he presented a “Roadmap for a More United, Stronger and More Democratic Union.” It is sure to steer the debate on a broader EU reform with a 27-member EU after Brexit. The Roadmap supplements the Commission’s White Paper on the Future of Europe, the Rome Declaration on the occasion of the 60th anniversary of the Treaties of Rome (both 2017) and the declaration at the Bratislava summit in September 2016 (see also eucrim 1/2017, pp. 3-6).

The Roadmap points out *inter alia* that the Commission envisages making a proposal by September 2018 on the extension of the tasks of the EPPO to include the fight against terrorism. Furthermore, an initiative to strengthen the enforcement of the rule of law in the

European Union will be announced by October 2018. (TW)

► [eucrim ID=1703003](#)

Area of Freedom, Security and Justice

Commission Presents Achievements and Priorities for 2018 in AFSJ Legislation

On the occasion of the State of the Union Address by European Commission President *Jean-Claude Juncker* on 13 September 2017 (see news item above), the Commission also released comprehensive material on the progress made in implementing the political guidelines set out by *Juncker* at the beginning of his mandate. The material also contains the priorities for initiatives to be launched and/or completed by the end of 2018.

Regarding achievements in the “area of justice and fundamental rights based on mutual trust,” the paper states that the focus has been on the implementation of the European Agenda on Security and the fight against terrorism. The latter mainly focuses on stepping up efforts to counter terrorist propaganda and radicalisation online.

The paper also mentions recent initiatives for new or modified EU IT systems designed for better law enforcement, e.g., ETIAS and the new EU PNR System, including plans to ensure interoperability between existing and future systems. The Schengen Information System now contains 70 million alerts and was consulted 4 billion times in 2016. The paper also highlights the establishment of the European Public Prosecutor Office by 20 EU Member States via the enhanced cooperation tool as a significant breakthrough in the fight against fraud (see news item below under “EPPO”).

Regarding priorities for 2018, the Commission lists the following working programme for the area of freedom, justice and security:

- Swift adoption by co-legislators of proposals on anti-money laundering, the

EU Entry/Exit System, the Schengen Information System (SIS II), the European Criminal Records Information System (ECRIS), and the European Travel Information and Authorisation System (ETIAS).

- Anti-terrorism package, including measures on countering radicalisation; measures to ensure the swift and proactive detection and removal of illegal content inciting hatred, violence, and terrorism; actions to cut off access to the means used by terrorists to prepare and carry out attacks, such as dangerous substances or terrorist financing; guidance and support for Member States in protecting public areas; and guidance on data retention;

- Delivering on the European Agenda on Security, including legislative proposals to allow interoperability between EU information systems for security, border, and migration management as well as a proposal to improve cross-border access by law enforcement authorities to electronic evidence.

The Commission also included the first concrete proposals for the future of Europe, including a possible extension of the European Prosecutor’s mandate to terrorism offences and a strengthened enforcement of the rule of law in the EU (see further news above). (TW)

► [eucrim ID=1703004](#)

Schengen

MEPs Back EU Entry/Exit System

On 25 October 2017, the majority of MEPs (477 to 139, with 50 abstentions) voted in favour of the draft Regulation introducing an EU Entry/Exit System (EES). The system is an additional European large-scale IT system, designed to register information on non-EU nationals, e.g., name, travel documents, fingerprints, facial image, date and place of entry/exit/refused entry into the Schengen area. It will apply both to travellers requiring a visa and to visa-exempt travellers admitted for a short stay of 90

days, who cross the Schengen area’s external borders. The main purpose is to facilitate Schengen border management by replacing the manual stamping of passports and speeding up border crossings. It will also be to easier detect overstayers as well as document or identity fraud (see [eucrim 2/2017](#), pp. 57-58).

According to the plans, data can be retained for three years and five years for over-stayers. Data stored in the EES can be consulted to prevent, detect, or investigate terrorist offences or other serious criminal offences. The data will be accessible to law enforcement, border control and visa authorities, and Europol.

The draft Regulation was already informally agreed on between representatives of the EP and the Council at the end of June 2017 (see [eucrim 2/2017](#), p. 57). However, after the CJEU’s Opinion 1/15, which declared the envisaged EU-Canada agreement on the transfer and processing of passenger name record (PNR) data incompatible with the Charter’s fundamental rights (see below under “data protection”), some MEPs argued for re-examination of the EES file. Their view was supported by an expert opinion commissioned by the Greens/EFA Group (see also below under “data protection”). An evaluation of the Council’s legal service of 7 September 2017 (Council doc. 11931/17) already goes in the same directions.

The biggest political group, however, the conservative European People’s Party (EPP), did not see any need to renegotiate the EES Regulation as a result of the CJEU’s assessment on the EU-Canada PNR agreement. Instead, MEPs of the EPP and EP President Antonio Tajani stressed the advantages of the new system for European citizens’ security and quicker border management.

Opponents in the EP pointed out the likely unlawfulness of the draft Regulation against the EU Charter of Fundamental Rights and the unproportional costs of establishing and maintaining a new IT system. Others criticized the

plans as “creating a Big Brother 2.0” at the EU borders or as representing “megalomaniac” thinking

The draft text must now be formally adopted by the Council before publication in the Official Journal of the EU. The EES is expected to be operational in 2020. (TW)

►eucrim ID=1703005

Temporary Reintroduction of Internal Border Controls Continues Until May 2018

As reported in previous eucrim issues (most recently 1/2017, p. 8 with further references), the six Schengen States Austria, Denmark, France, Germany, Norway, and Sweden reintroduced internal border controls within the Schengen area – with the backing of the Council and the European Commission. This was in response to the migratory and refugee crisis, which started in 2015, to deficiencies in external border management in Greece, and to secondary movements resulting from these deficiencies.

The Schengen Border Code (Regulation 2016/399) provides the possibility to reinstate border controls within the Schengen area as an exception if there is a serious threat to public policy or internal security in a Member State. Border controls can, however, only be maintained temporarily. The Schengen Border Code distinguishes between initial limits and maximum ones and makes the period dependent on the situation (cases requiring immediate action and cases of foreseeable events). As in the case at issue, border controls can only be upheld for an initial period of six months (renewable) but cannot exceed two years in total. After the Council having authorised the said Member States to prolong their internal border controls for another six months in May 2017, the maximum period of two years would have ended in November 2017.

On 27 September 2017, the Commission clarified that said Member States can no longer justify the reintroduction or prolongation of their internal border

control based on the migratory crisis. However, all Member States, including those carrying out internal border controls, have the possibility to temporarily reintroduce border controls in the event of *another* serious threat to public policy or internal security.

On 12 October 2017, the German Federal Minister of the Interior, *Lothar de Maizière*, announced that Germany will prolong checks at internal borders as from 12 November 2017 for another 6-month period. He justified this decision with the current threat of terrorism, deficiencies regarding the protection of the external borders, and illegal migration in the Schengen area. However, the controls will be limited, for the time being, to the German-Austrian land border as well as to flight connections from Greece to Germany. *De Maizière* stated that a complete re-establishment of a Schengen area without internal border controls is only possible if the general situation improves.

In the meantime, also the other five Schengen states, announced that they will maintain internal border controls after 12 November 2017 for another six months (partly for specific land borders). (TW)

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Commission Issues Recommendation on How to Better Apply Current Internal Border Controls

In order to safeguard the idea of Schengen (the free movement of persons) in the current situation, the Commission issued a “Recommendation on the implementation of the provisions of the Schengen Borders Code on temporary reintroduction of border control at internal borders in the Schengen area.” The Recommendation supplements the Commission’s press release as to the extent to which internal border controls within the Schengen area can be maintained in accordance with the current rules of the Schengen Borders Code (see news above).

The Recommendation reminds Member States that the introduction of tempo-

rary internal border controls should be a last resort. They are also advised to thoroughly examine alternative measures in accordance with the Recommendation of the Commission of 12 May 2017 (C(2017) 3349 final) on proportionate police checks and police cooperation in the Schengen area. The new Recommendation also stresses that Member States intending to reintroduce border controls should assess the likely impact on the free movement of persons, both within the area without internal border control as well as on the internal market. These Member States are ultimately encouraged to cooperate closely with their neighbours. (TW)

►eucrim ID=1703007

Commission Proposes Reform on Reintroduction of Internal Border Controls

In parallel to a Recommendation on how the current provisions of the Schengen Borders Code should be handled if a Schengen State intends to temporarily reintroduce border controls at its internal borders (see news item above), the Commission presented a legislative proposal to update these Schengen rules on 27 September 2017. The proposal aims at adapting the rules on the temporary reintroduction of internal border controls in a targeted manner, in order to adjust them to the current need to respond to evolving and persistent serious threats to public policy or internal security, e.g., serious cross-border terrorism threats or secondary movements of irregular migrants.

In essence, the Commission proposes the following:

- Extending the current time limits (controls could be prolonged up to a maximum period of one year instead of six months as well as the possibility of prolonging for another two years in maximum);
- Adding, in parallel, stronger procedural safeguards to ensure that the controls are introduced as a last resort (including a new obligation for Member

States to prepare a detailed risk assessment justifying the last resort);

- Introducing a new special procedure for cases in which the same serious threat to public policy or internal security continues to persist after one year.

The update would also reinforce the Recommendation of the Commission of 12 May 2017 (C(2017) 3349 final) on proportionate police checks and cross-border cooperation in the Schengen area as well as the duty to cooperate with neighbouring Member States. (TW)

► eucrim ID=1703008

Legislation

Commission Report on Member States' Compliance with EU Law

On 6 July 2017, the Commission published its annual report on monitoring and enforcing the application of EU law in 2016. The report highlights the main developments of the Commission's enforcement policy in the political priority areas set out by Commission's President Jean-Claude Juncker at the beginning of his mandate. As part of its enforcement policy, the Commission also addresses current trends in breaches of EU law affecting the interests of citizens and businesses. The Commission took action, for instance, against Member States' failure to establish or apply penalty systems to deter car manufacturers from violating car emission legislation.

In general, the report identifies the following:

- Open infringement procedures increased considerably compared to the previous year (by 21%);
- Cyprus and Belgium had the highest number of open cases concerning late transposition of EU law. Germany and Spain were at the top of the list of Member States concerning pending cases for incorrect transposition and/or wrong application of EU law;
- Most infringement cases in 2016 were initiated in the policy areas concerning the internal market, industry,

entrepreneurship, and SMEs as well as the environment;

- 1657 infringement procedures remained open at the end of 2016;

- The number of new infringement procedures before the CJEU relating to late transposition almost doubled in comparison to the previous year (from 543 cases in 2015 to 847 cases in 2016);

- Three proceedings were brought to the CJEU requesting financial penalties because of persisting infringement (two cases against Luxembourg, one against Romania).

In addition to the facts and charts on the development of infringement cases in the entire EU (EU-28), the Commission also issued factsheets on the monitoring of EU law per country. Furthermore, the report and its accompanying staff working paper detail the application of EU law in the various policy fields. Regarding issues of European criminal law, the following can be observed:

- The transposition of Directive 2012/29/EU on the rights, support, and protection of victims of crime is still incomplete in nine Member States;

- In 2016, the Commission started its assessment of the correct implementation of two Directives strengthening safeguards in criminal proceedings: Directive 2010/64 on the right to interpretation and translation and Directive 2012/13 on the right to information;

- Although almost all Member States have completed the transposition of Directive 2011/99 on the European Protection Order, its use in practice remains rather low;

- In September 2016, the Commission launched infringement procedures against 18 Member States for not communicating their national measures to transpose the Directive on criminal sanctions for market abuse (Directive 2014/57);

- The Commission started preparatory work to help Member States and stakeholders implement and apply the new Directive on data protection in police and criminal justice (Directive 2016/680).

The report also stresses that a lot of enforcement work in 2016 was carried out in relation to instruments that fledge the European Agenda on Security. This includes infringement procedures regarding instruments that had already been adopted within the "third pillar" of the Amsterdam Treaty, e.g., the "Swedish initiative" (Framework Decision 2006/960/JHA) on simplifying the exchange of information and intelligence between EU law enforcement authorities and the "Prüm Decisions" (Decisions 2008/615/JHA and 2008/616/JHA) on information-sharing to combat terrorism and serious crime. The Commission's actions against Poland for its rule of law violations were another focus in 2016 (see also news item above under "Fundamental Rights" and eucrim 3/2016, p. 122).

The annual report on monitoring the application of EU law has been issued since 1984 (following a request by the European Parliament). The European Parliament adopts resolutions on the report. Alongside the annual report, the Commission also publishes a "Single Market Scoreboard" in which the implementation of the rules on the single market are checked. (TW)

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Institutions

European Court of Justice (ECJ)

ECA Review on Case Handling

On 26 September 2017, the European Court of Auditors published a performance review to assess the management system for cases brought before the Court of Justice and the General Court of the EU. The review, which was requested by the European Parliament, recognises the efforts made by the Courts towards a more efficient case handling and a significant reduction in the time taken to deal with cases. The average handling time of a case before the Court of Justice

was reduced from 19.6 to 14.7 months and from 25.8 to 18.7 months before the General Court. Nevertheless, the review concludes that the CJEU could further enhance these positive results by measuring its performance on the basis of a more active individual case management, using tailored timeframes and monitoring the actual use of the human resources employed. (CR)

► eucrim ID=1703010

OLAF

Commission's Evaluation Report on OLAF Regulation

On 2 October 2017, the Commission published its report for the EP and the Council on the evaluation of the application of Regulation No 883/2013 concerning investigations conducted by OLAF. The evaluation report is stipulated in Art. 19 of said Regulation. For now, it is the final step in a longer evaluation process, which includes an evaluation analysis by an external contractor and a stakeholder conference held in March 2017 (see eucrim 1/2017, p. 10).

The main purpose of the evaluation report is to lay the basis for discussion on whether there is a need to amend Regulation 883/2013. Although the evaluation covers the Regulation as a whole, it focuses on the changes introduced in 2013 (compared to the previous 1999 legal framework). The major changes include:

- Improved effectiveness, efficiency, and accountability of OLAF while safeguarding its independence;
- Strengthened procedural guarantees for and fundamental rights of persons subject to investigation;
- Strengthened cooperation with Member States, EU institutions, bodies, offices, and agencies (in the following: IBOAs), third countries, and international organisations;
- Reinforced governance of OLAF.

Against this background, the evaluation had to do an assessment in four ar-

eas: effectiveness, efficiency, coherence, and relevance. In this context, the Commission report outlines the following key findings:

- In general, the objectives of the 2013 OLAF reform remain relevant at present and in the future, in particular after the establishment of the European Public Prosecutor's Office;
- Effectiveness: Several provisions in the Regulation resulted in improving the effective conduct of OLAF's investigations. Provisions enabling structured collaboration led to better cooperation and information exchange between OLAF and its partners;
- Efficiency: Together with internal organisational measures, the Regulation improved the efficiency of case selection and investigations. This could be proved by the increased number of investigations handled by investigative staff as well as the increase in the number of recommendations and amounts recommended for recovery.

Regarding both effectiveness and efficiency, the evaluation report also lists several shortcomings that have had a considerable impact on the conduct of OLAF's investigations. It also makes several recommendations on improving the situation. The main issues are the following:

- OLAF's powers highly remain dependant on the applicable national law to which the Regulation often refers. As a consequence, the exercise of OLAF's powers in the Member States is fragmented due to the different interpretations of the relevant provisions and differences in national law;
- Since OLAF does not have its own enforcement tools, e.g., in cases of refusal or obstruction by suspects or witnesses, the Office has to rely on the support of the competent national authorities. However, many divergences still exist across the EU Member States;
- Improving investigative powers available to OLAF should be considered, such as a better access to bank account information, which is a central in-

strument in uncovering fraud (especially VAT fraud) and other irregularities;

- Divergences also exist in internal investigations, since the OLAF Regulation applies in conjunction with the internal decisions adopted by each IBOA. Therefore, a more uniform protection standard is necessary. Moreover, applicable rules on internal and external investigations should be further aligned (where divergences are not justified), in order to establish a more coherent framework;
- An earlier transmission of information by OLAF to IBOAs should be considered in cases in which this would not hinder the success of investigations. In this way, precautionary measures could be taken more efficiently.

The report identifies that one of the major problematic issues that remains is the follow-up to OLAF recommendations in the EU Member State. Although the report found that the quality and timeliness of OLAF's final reports are a considerable factor influencing follow-up, the most significant shortcoming is the handling of OLAF-collected evidence in follow-up proceedings at the national level. Member States apply the rule in the Regulation in highly different ways. OLAF reports constitute admissible evidence in judicial proceedings in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors. This hinders the effectiveness of OLAF's activities.

As far as the new provisions on procedural guarantees in the 2013 Regulation are concerned, the report states that whilst a number of consulted stakeholders raised concerns about the added value of the new provisions, others argued that the balance between OLAF powers and procedural rights is appropriate. Yet again others called for a reinforcement of procedural rights. In conclusion, the evaluation does, however, not provide evidence that the procedural guarantees in the Regulation are insufficient in the context of OLAF's current investigative powers and tools.

Regarding *coherence*, the report mainly mentions two issues:

- The Regulation does not contain detailed provisions on the modalities of coordination or the procedures applicable in so-called “coordination cases.” This results in a lack of legal certainty for OLAF and for the Member States that rely on OLAF’s assistance.
- Inconsistencies exist between Regulation 883/2013 and other relevant acts of EU law, in particular Regulations 2185/96 and 2988/95, which contain the most important investigative tools for OLAF.

The report also addresses the future path in the light of the creation of the EPPO, which is being called a “game-changer.” The existence of the additional body – equally competent to investigate fraud and other irregularities against the EU budget – represents the major future challenge to OLAF’s work. The report states that the establishment of the EPPO will not change OLAF’s overall mandate. The EPPO will be competent for *criminal* investigations of EU fraud, whereas OLAF will remain competent for the *administrative* investigation of suspected fraudulent and non-fraudulent irregularities in the Union IBOAs and in all Member States, with a view to issuing recommendations to launch judicial, disciplinary, financial, or administrative procedures. However, several adaptations are necessary in view of OLAF’s operations:

- A scheme of close cooperation must be set up between the EPPO and OLAF;
- A mechanism must be established ensuring that there is no duplication of investigations into the same facts.
- Coordination rules are necessary, ensuring that all bodies can contribute to an effective protection of the EU budget throughout the Union, including those Member States not participating in the EPPO.

What is the way forward? The Commission announces in the report that it will carry out an assessment, which may lead to a proposal for an amend-

ment of Regulation 883/2013 in the first half of 2018. This assessment would mainly address the necessary changes in OLAF’s role and operation in view of the EPPO. A revised legal framework for OLAF is to be in place before the EPPO starts its operational activity (envisaged for 2020). The reform would “also include possible additional targeted changes, where necessary, based on the most unambiguous findings of the evaluation,” according to the report. This means, in particular, enhancing the effectiveness of OLAF’s investigative function. Issues to be tackled include the following:

- More coherent rules on investigative powers applicable to OLAF across the EU Member States and IBOAs;
- New rules on the admissibility of OLAF reports as evidence in judicial proceedings in the Member States;
- Reinforcement of OLAF’s existing enforcement powers, including a revision of the duties to cooperate;
- Improvements as to OLAF’s access to bank account information;
- New provisions regulating the conduct of coordination cases.

Ultimately, the report points out that a reform with more fundamental changes will be initiated in the medium or longer term. It will include a modernisation of the framework for OLAF investigations, which dates back to the 1990s.

The Commission’s evaluation report is accompanied by a staff working document that carries out a thorough in-depth analysis of the evaluation. All documents, including the report by the external contractor, are available on the OLAF website as indicated in the following eucrim-ID. (TW)

►eucrim ID=1703011

OLAF’s Supervisory Committee Opinion on Evaluation of Regulation 883/2013

In addition to the Commission’s evaluation report (see news item above), OLAF’s Supervisory Committee (SC) also published an opinion on the application of Regulation 883/2013. The

opinion of the SC is also required by Art. 19 of the Regulation. It is an independent document drafted in parallel to the Commission evaluation report.

After analysing the legal framework within which OLAF operates, the SC deals with the following five issues:

- The investigation lifecycle: the impact of the new Regulation No 883/2013 on the effective conduct of investigations by OLAF;
- Respect for fundamental rights and procedural guarantees during investigations led by OLAF and the right to effective judicial review;
- Supervision and control of OLAF’s investigations; the role of the Supervisory Committee and its interaction with other bodies;
- The role, status, and competences of the Supervisory Committee and its Secretariat: Regulation No 883/2013 and Regulation No 2016/2030;
- The establishment of the European Public Prosecutor’s Office and its impact on OLAF investigations; the role of the SC in relations with the EPPO.

The opinion of the SC is mainly based on documents brought to the current SC within its mandate. In addition, cases brought before the ECJ and the European Ombudsman relating to OLAF as well as reports and opinions of previous SCs were examined.

The SC makes several recommendations which relate to possible amendments of Regulation No 883/2013. According to the SC, amendments should consider *inter alia* the following issues:

- Unifying the grounds for all OLAF investigations in order to avoid fragmentation and interpretation difficulties, strengthening of clarity of law and procedural guarantees, and inserting an exhaustive code of OLAF’s powers;
- Laying down comprehensive investigation procedures in order to replace the existing patchwork of rules that guide the conduct of investigations;
- Counterbalancing the wide discretion of the Director-General of OLAF to open investigations;

- Better indicating the main areas of OLAF’s investigations;
- Establishing clear means of action for OLAF (the Commission’s powers in investigating competition law cases could serve as a model);
- Appointing a fundamental rights and procedural guarantees officer for OLAF;
- Reintroduction of a mechanism with an ex ante monitoring and quality control by the SC;
- Setting out clear rules on time-barring through the investigation lifecycle and putting in place follow-up teams containing experts in judicial follow-up and in checks-of-evidence gathering;
- Also adopting the “EPPO standard on procedural safeguards” (in particular applicability of the EU Directives on procedural rights) to OLAF investigations;
- Establishing direct access to an independent court, which could review individual OLAF actions and recognise the legitimate expectations of persons affected by OLAF investigations – a solution that would also enhance the admissibility of evidence collected by OLAF;
- Stipulating rules ensuring better provision of the SC’s access to OLAF information and data, e.g., continuous access to general and specific case-related data in OLAF’s databases.

Although not initially envisaged by the OLAF Regulation, the establishment of the EPPO is casting shadows on the SC’s opinion. Like the Commission’s evaluation report, the SC believes that appropriate competences are an indispensable precondition influencing OLAF’s ability to assist the EPPO. In addition, the SC finds strengthening of OLAF’s powers necessary, but also emphasises that control of the Office’s powers should be increased at the same time. Regarding the future role of the SC in an “EPPO setting,” the SC “likes to play a significant role in creating structural, operational and competence links between OLAF and its partners.”

The SC’s opinion will be forwarded to the EP and the Council, together with the Commission’s evaluation report

on the OLAF Regulation. The EP and Council will then give their statements on the documents. (TW)

►eucrim ID=1703012

Successful Operations Against Cigarette Smuggling

In two press releases (published on 31 July and 2 October 2017) OLAF reported on several successful operations against cigarette smuggling. The operations included the dismantling of criminal networks that benefit from illegally importing cigarettes into the EU.

Between May and July 2017, operations led to the seizure of 140 million so-called cheap whites in six countries; 32 persons were arrested.

In August and September 2017, OLAF helped Member States’ authorities stop the flow of contraband cigarettes, resulting in an overall seizure of more than 11 million cigarettes and the arrest of four persons. OLAF played different roles in the operations:

- Providing Member States’ customs services with important information on suspicious shipments;
- Coordinating surveillance;
- Bringing together pieces of intelligence to provide technical assistance in the framework of the Hercule III Programme.

A key element for the success of the operations was also the collaboration between OLAF and third countries, such as the Ukraine, where OLAF facilitates a swift exchange of information. (TW)

►eucrim ID=1703013

European Public Prosecutor’s Office (EPPO)

EPPO’s Regulation Adopted and Published

On 12 October 2017, the JHA Ministers of those Member States that are part of the EPPO enhanced cooperation adopted the Regulation establishing the European Public Prosecutor’s Office (EPPO). The EP had previously given

its consent to the text agreed on by the 20 Member States participating in enhanced cooperation on 5 October 2017. 456 MEPs approved the recommendation of Rapporteur MEP Barbara Matera to consent, while 115 voted against, and 60 abstained. In this context, it should be noted that the establishment of the EPPO is subject to a special legislative procedure under which the EP can only give its consent or not (Art. 86(1) TFEU). It is not a co-legislator, in the true sense, influencing the legal text.

The text of the new Regulation (EU) 2017/1939 was published in the Official Journal L 283 of 31 October 2017, p. 1.

So far, the following 20 EU Member States have joined the enhanced cooperation: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Germany, Greece, Spain, Finland, France, Italy, Latvia, Lithuania, Luxembourg, Portugal, Romania, Slovenia, and Slovakia. Non-participating countries include Denmark, the UK, Ireland, Hungary, Poland, Malta, Sweden, and the Netherlands. They may join at any time. The Netherlands indicated on 10 October 2017 that it might join after the Rutte III cabinet takes office.

For information on the development of the EPPO Regulation towards enhanced cooperation, see eucrim 2/2017, p. 64; eucrim 1/2017, p. 12; eucrim 4/2016, p. 159; eucrim 3/2016, p. 126; eucrim 2/2016, p. 72-73; eucrim 1/2016, p. 10; and eucrim 4/2015, p. 132.

In short, the purpose of the regulation is to create a new body at the EU level with the authority, under certain conditions, to investigate and prosecute EU fraud and other crimes affecting the Union’s financial interests. It will bring together European and national law-enforcement efforts to counter offences detrimental to the EU’s financial interests.

The main features of Regulation 2017/1939 are as follows:

Structure:

- The EPPO will be an indivisible Union body operating as one single of-

fice. As proposed by the Commission in its draft of 2013 (see eucrim 2/2013, pp. 41-42), the EPPO has been designed to have a decentralised structure, while the Council added some elements of a college structure similar to that of Eurojust. The EPPO has a central and a decentralised level.

- The central level consists of the College, the Permanent Chambers, the European Chief Prosecutor and its Deputy, the European Prosecutors, and the Administrative Director.

- The European Chief Prosecutor heads the EPPO, but it has predominantly representative functions (in contrast to the original Commission proposal).

- Each participating Member States is represented by one (European) prosecutor.

- The College of the EPPO is principally responsible generally overseeing the activities of the EPPO; it is not involved in operational decisions in individual cases.

- The Permanent Chambers at the central level are mainly responsible for monitoring, directing, and coordinating the investigations and prosecutions conducted by the European Delegated Prosecutors.

- Investigations and prosecutions are carried out at the decentralised level by the European Delegated Prosecutors (EDPs) who are located in each Member State. The number of EDPs for Member States are decided nationally, but each one should have at least two.

- EDPs are “double-hatted,” since they are an integral part of the EPPO, but continue to exercise their functions as national prosecutor with regard to investigations, prosecutions, and bringing cases to judgment.

Tasks and competences:

- The EPPO will be responsible for investigating, prosecuting, and bringing to judgment the perpetrators of, and accomplices to, criminal offences affecting the financial interests of the Union. It will undertake investigations, carry

out acts of prosecution, and exercise the functions of prosecutor in the competent courts of the Member States until the case has been finally disposed of.

- The EPPO’s material competence is linked to the criminal offences provided for in Directive 2017/1371 (“the PIF Directive,” see eucrim 2/2017, pp. 63-64) as implemented by national law.

- Specific conditions are set out in the Regulation for the EPPO to investigate cross-border VAT fraud. It will become competent if the intentional acts or omissions are connected with the territory of two or more Member States and involve a total damage of at least €10 million.

- The EPPO will also be competent for any other criminal offence that is “inextricably linked” to criminal conduct as defined by the PIF Directive.

- The Regulation contains rules on the territorial and personal competence of the EPPO.

- The EPPO has a right of evocation in the exercise of its competence.

- The Regulation widens the scope of reporting obligations by national authorities and gives the EPPO possibilities to request additional information.

Investigative measures:

- To a certain extent, the Regulation ensures that the EPPO is equipped with sufficient investigative tools to conduct its investigations. A list of investigative measures is provided for this purpose for offences exceeding a certain threshold (maximum penalty of at least four years of imprisonment). Thus, all EDPs should be able to resort to certain investigative measures, e.g., search of premises, production of any relevant object or document, production of stored computer data, freezing of instrumentalities or proceeds of crime. These measures must be available to the EDPs in the respective participating Member States.

- As a rule and unless specified in the Regulation, the national law of the Member State whose EDP is handling the case applies to investigations and prosecutions.

- In cross-border investigations, the EDPs of the involved Member States must assist each other. Rather complicated provisions establish which and where judicial authorisation is required before an investigative measure can be carried out.

Procedural safeguards:

- Activities of the EPPO must be in full compliance with the rights of suspects and accused persons referred to in the CFR.

- Regarding minimum rights, the Regulation refers to the adopted EU Directives on procedural safeguards, e.g., the right to interpretation and translation, the right to information, access to a lawyer or legal aid (for these Directives, see previous eucrim issues under “Procedural Criminal Law > Procedural Safeguards” as well as the articles by S. Cras).

- Suspects will have the right to present evidence, to request expert examination, and to request the hearing of witnesses. They can also request the EPPO to implement such measures on behalf of the defence.

Judicial review:

- Judicial review of EPPO procedural acts will mainly be carried out by national courts; if necessary, national courts may initiate preliminary ruling procedures before the CJEU.

- The CJEU may carry out judicial review directly, inter alia for the following events: decision to dismiss a case, contested on the basis of EU law; disputes relating to compensation of damage caused by the EPPO; disputes concerning arbitration clauses; staff-related matters; and decisions affecting the rights of data subjects.

Relationship with partners

- The EPPO can only work effectively if cooperative relations are set up with existing EU agencies, offices, and bodies, in particular Eurojust, OLAF, and Europol. Relations should also be forged

with competent authorities in the non-participating Member States and third countries. In this regard, the Regulation has provided only a general framework, which must be refined by certain special rules and/or agreements in the future.

- Cooperation with Eurojust will take place on a case-by-case basis, including the exchange of information on their investigations.

- The EPPO must establish a close cooperation with OLAF, especially as regards information exchange. According to the Regulation, parallel investigations into the same facts should be avoided. The EPPO may request OLAF to provide information, facilitate coordination, and conduct administrative investigations.

- Cooperation with Europol is to be based on a working arrangement setting out the modalities of cooperation. The EPPO will be able to request any relevant information held by Europol if necessary for the purpose of an investigation. The EPPO may also ask Europol for analytical support to a specific investigation conducted by the EPPO.

- Concerning relations between the EPPO and Member States not participating in enhanced cooperation – in the absence of a specific legal cooperation instrument –, the Regulation foresees possible notification of the EPPO as a competent authority for application and implementation of existing EU legal instruments on judicial cooperation in criminal matters, e.g., the European Arrest Warrant or the European Investigation Order.

- Regarding the relations with third countries, the EPPO is likely to establish similar structures as Europol or Eurojust did, i.e., the conclusion of working agreements regulating the exchange of strategic information, the secondment of liaison officers, or the designation of contact points.

EPPO's central office will be in Luxembourg. It is expected that the EPPO scheme will be operational by 2020. The precise date will be determined by the

Commission. From now on, euclid will report on further developments on the EPPO under a separate heading in the section “Institutions” (TW)

► euclid ID=1703014

Discussions on Possible Extension of EPPO Mandate

On 13 September 2017, Commission President *Jean-Claude Juncker* indicated in a “letter of intent” to EP President *Antonio Tajani* and the Estonian Prime Minister *Jüri Ratas* (currently holding the Presidency in the Council) that the Commission will present a communication by 2025 on a possible extension of the EPPO's mandate to include the fight against terrorism (on the basis of Art. 86(4) TFEU). In doing so, *Juncker* opened the debate on the EPPO's tasks in the mid-term future (see also news item above under “Foundations” > “Reform of the EU”).

His views were supported by French President *Emmanuel Macron* in his “initiative for Europe” speech, held in Paris on 26 September 2017. He advocates a strong European Public Prosecutor who will also be responsible for combating organised crime and terrorism. He considers this institution to be one of the pillars of “a Europe of security.”

Similarly, on the occasion of the EP's vote on the EPPO Regulation on 5 October 2017, EP President *Antonio Tajani* stated that he favours the possibilities offered by the EPPO to combat terrorism and organised crime, since “citizens expect Europe to be there where it can make a difference.”

In its current shape, the EPPO is only competent to investigate and prosecute crimes affecting the financial interests of the Union, as foreseen in Art. 86(1) TFEU. A possible extension of the EPPO's task would require a unanimous decision of the European Council (i.e., the heads of state or government of EU countries) after obtaining the consent of the European Parliament and after consulting the Commission. However, the question now emerges as to whether the

requirement of unanimity includes or excludes the EU countries not participating in enhanced cooperation of the EPPO. (TW)

► euclid ID=1703015

Europol

Operation against Darknet Sale of Firearms

At the beginning of October 2017, a major vendor of firearms sold through the Darknet as well as six buyers were arrested in a joint operation carried out by law enforcement and customs authorities in Cyprus, Germany, Spain, Sweden, the UK, the US and Europol. The respective Darknet marketplace, AlphaBay, has since been taken down by US authorities. (CR)

► euclid ID=1703016

Observer Status for the Egmont Group

On 17 July 2017, the Egmont Group of Financial Intelligence Units (FIUs) awarded Europol an observer status, aiming at increased cooperation with FIUs and other competent authorities tasked with combating money laundering and terrorist financing.

Formed in 1995, the Egmont Group is a united body of 156 FIUs from around the world providing a platform for the secure exchange of expertise and financial intelligence to combat money laundering and terrorist financing. (CR)

► euclid ID=1703017

Eurojust

Memorandum of Understanding with eu-LISA

On 19 September 2017, Eurojust signed a Memorandum of Understanding with the European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (eu-LISA). The MoU will enhance expertise and best practices between the two agencies in areas such as the

exchange of information, ICT-related matters, and cooperation with regard to the right of Eurojust to access SIS II. Furthermore, each agency will install a contact point to coordinate cooperation with its counterpart.

Eu-LISA was established in 2011 to provide a long-term solution for the operational management of large-scale IT systems relevant for the asylum, border management and migration policies of the EU. The Agency is currently managing EURODAC, the Visa Information System (VIS) and second generation Schengen Information System (SIS II). The agency's core mission is to be dedicated to continuously add value to Member States, supporting through technology their efforts for a safer Europe. The headquarters of eu-LISA are based in Tallinn, Estonia, whilst its operational centre is in Strasbourg, France. There is also a business continuity site for the systems under management based in Sankt Johann im Pongau, Austria. (CR)
 >eucrim ID=1703018

Recent Changes in the Composition of Eurojust

On 24 October 2017, the College of Eurojust elected *Ladislav Hamran*, National Member for the Slovak Republic, as the new President of Eurojust. He was appointed National Member for the Slovak Republic in September 2007 and elected Vice-President in December 2013 and 2016 (see eucrim 1/2014, p. 6 and eucrim 4/2016, pp. 157-158). Before joining Eurojust, he worked as a prosecutor in the Penal Department of the General Prosecutor's Office.

Mr. Hamran replaces *Michèle Coninx*, National Member for Belgium since its beginning in 2001. She was appointed as Executive Director of the Counter-Terrorism Executive Directorate (CTED) at the UN.

In June 2017, *Solveig Wollstad* took up her second term as National Member for Sweden at Eurojust. Ms. Wollstad had already served as National Member for Eurojust from 2004-2007. After

leaving Eurojust in 2007, she served as Chief Public Prosecutor and Head of the International Public Prosecution Office for the south of Sweden, as Head of the East Public Prosecution Area (Eastern Region) of the Swedish Prosecution Service, and lastly as Head of five District Prosecution Offices.

In July 2017, *Philip Galea Farrugia* was appointed National Member for Malta. Before joining Eurojust, Mr. Farrugia served as Assistant Attorney General and Head of the Criminal Law and Prosecution Unit at the Office of the Attorney General in Malta.

At the end of August, *Boštjan Škrlec* took office as National Member for Slovenia at Eurojust. Mr. Škrlec has more than 20 years of experience in the judiciary, with positions held in the Slovenian Office of the Prosecutor General and Ministry of Justice. Before joining Eurojust, he was Director General at the Office of the State Prosecutor General of the Republic of Slovenia. (CR)
 >eucrim ID=1703019

New Premises Opened

On 4 October 2017, Eurojust officially opened its new premises with a ceremony in the international quarter of The Hague. The new building, which provides 400 workplaces, is a joint project of the Municipality of The Hague, the Ministry of Security and Justice, and the Central Government Real Estate Agency of the Dutch government, Heijmans construction services, and Eurojust. (CR)
 >eucrim ID=1703020

Agency for Fundamental Rights (FRA)

Observers from FYROM

Following a decision of the Council at the beginning of October 2017, two representatives from the former Yugoslav Republic of Macedonia (FYROM) joined FRA's Management Board as observers.

Ixhet Memeti, FYROM's Ombudsman, was appointed as full observer and

Uranija Pirovska, the Executive Director of the National Helsinki Committee for Human Rights, as deputy observer to the Management Board. (CR)

>eucrim ID=1703021

Reception Facilities in the EU

In September 2017, FRA published a report assessing to what extent selected EU Member States have put in place mechanisms to ensure the appropriate oversight and control of quality standards in reception facilities. These standards concern housing, food, healthcare, information, and the best interests of the child. The report looks at 14 EU Member States (Austria, Bulgaria, Denmark, Finland, France, Germany, Greece, Hungary, Italy, The Netherlands, Poland, Slovakia, Spain, and Sweden).

According to the report, all 14 EU Member States face significant challenges regarding conditions in reception facilities. Most of them, however, also report that positive developments outweigh these challenges. The majority has implemented some form of written standards for reception facilities. Most of the 14 Member States have designated bodies to oversee reception conditions and inspect the facilities on a regular basis. However, the oversight bodies are also independent in only three Member States. In most of the 14 Member States, asylum seekers can lodge a complaint against the conditions of reception facilities. The number of complaints, however, seems to be very low. (CR)

>eucrim ID=1703022

Frontex

First Anniversary of "New" Frontex

At the beginning of October 2017, Frontex celebrated its first anniversary under the Regulation (EU) 2016/1624, which established Frontex as the European Border and Coast Guard Agency (see eucrim 3/2016, p. 126 and 4/2016, p. 158).

Since then, Frontex has grown by one third to a staff of 488, with a goal of

having 1000 employees by 2020. Under the new mandate, officers deployed by Frontex now have access to various EU databases, including the Schengen Information System (SIS), which allows them to perform more effective border checks. Furthermore, Frontex can now assist individual Member States in national return operations. By means of vulnerability assessments, Frontex analyses border control capacity in order to determine individual countries' readiness to face challenges at their external borders, and it issues individual recommendations.

From January to October 2017, Frontex assisted in the return of more than 10,000 foreign nationals, nearly twice as many as in 2016. (CR)

►eucrim ID=1703023

AFIC Project on Joint Intelligence Analysis

At the end of September 2017, Frontex launched a project to develop the capacity of Africa-Frontex Intelligence Community (AFIC) countries to work on the joint intelligence analysis of crime. This project focuses on training experts and setting up AFIC Risk Analysis Cells (RACs). It receives funding from the European Commission.

The project was launched at the 21st meeting of the Africa-Frontex Intelligence Community (AFIC) hosted by Frontex. (CR)

►eucrim ID=1703024

Joint Action Day Against People Smuggling and Trafficking at Airports

An international operation ran by Frontex and German authorities led to the arrest of eight persons suspected of facilitating illegal immigration, trafficking in human beings, and supplying false documents. The operation took place at 39 European airports inside and outside the EU and was part of a series of joint action days (Operation Dragon 2017) bringing together police forces of the EU Member States, Frontex, Europol, and Interpol this year. (CR)

►eucrim ID=1703025

Save the Children Joins Consultative Forum

At the end of September 2017, Save the Children, a non-governmental organisation to promote children's rights, joined the Frontex Consultative Forum. The NGO was selected following a public call on Frontex' website. (CR)

►eucrim ID=1703026

Specific Areas of Crime / Substantive Criminal Law

Protection of Financial Interests

2016 PIF Report

On 20 July 2016, the Commission adopted its annual report on the protection of the EU's financial interests (PIF report). The report is designed to inform the European Parliament and the Council about the approaches, procedures, and tools used by the EU Member States to fight fraud in 2016. It also details the initiatives and measures taken by the Commission at the EU level in 2016 to counter fraud affecting the EU budget. Importantly, it also helps to identify areas where the protection of EU funds can be reinforced.

All in all, the 2016 PIF report highlights the ways in which the fight against fraud affecting European Union funds can be enhanced by coordination and cooperation efforts, both at the national and European levels. The EU and its Member States also made progress in tackling the cross-border challenges of fraud against the EU's financial interests in the past year. Both national and EU bodies showed increased awareness of the threats posed by fraudsters, growing willingness to share information and best practices, and renewed political commitment towards addressing these challenges head-on.

In figures, the report points out, *inter alia*, that 19,080 (fraudulent and non-fraudulent) irregularities were reported to the Commission in 2016, involving

a total of approximately €2.97 billion. About €2.43 billion concerned the expenditure sector of the EU budget.

2016 was marked by several measures aimed at improving the legal and administrative framework of the fight against fraud at the EU level. These measures included:

- The political agreement reached on the PIF Directive (see eucrim 4/2016, p. 158);
- The progress made in establishing the European Public Prosecutor's Office;
- The launch of the evaluation of the OLAF regulation (see news item above under "Institutions > OLAF");
- The Riga declaration on strengthening the fight against corruption;
- The successful negotiation of anti-fraud provisions into international agreements of the EU by OLAF.

On the expenditure side, the report highlights the Early Detection and Exclusion System (EDES) that was put in place on 1 January 2016, which aims at reinforcing the protection of the EU budget against unreliable economic operators. A simplification of the EU's Financial Regulation was also proposed by the European Commission.

On the revenue side, boosts to the EU's anti-fraud efforts mainly resulted from the revised Regulation 515/97 on mutual administrative assistance in customs. It now provides for two centralised databases containing information on container movements and on goods entering/leaving/transiting the EU, Joint Customs Operations conducted by OLAF, and an action plan on VAT.

Regarding anti-fraud measures taken by the EU Member States, the report stresses that several Member States adopted National Anti-Fraud Strategies (NAFS) in order to manage the fight against fraud in a structured and coordinated way. All Member States adopted specific anti-fraud measures covering the entire anti-fraud cycle from prevention to detection, investigation, prosecution, recovery, and sanctions. The fight against corruption and organised crime

was also high on the agenda in 2016, as Member States took concrete action to target tax havens, implement e-tools for criminal proceedings, conduct anti-fraud trainings, and raise awareness.

In the concluding section, the report sets out a number of recommendations addressed to the Member States, which aim to step up their efforts to better protect the EU budget.

The future will be particularly characterised by the new PIF Directive and the establishment of the EPPO, both of which will change the legal landscape in the PIF area by providing new impetus for the fight against fraud. This was also stressed by Commissioner *Gunther H. Oettinger*, responsible for Budget and Human Resources, when presenting the report. (TW)

► eucrim ID=1703027

Follow-up to the *Taricco* Judgment – AG Calls for Italy to Disapply Absolute Limitation Periods

On 18 July 2017, Advocate General *Yves Bot* delivered a far-reaching opinion in a case brought to the CJEU by the Italian Constitutional Court (*Corte costituzionale*, ICC). It dealt with the repercussions of the famous *Taricco* judgment rendered by the CJEU on 8 September 2015.

In the *Taricco* case, the CJEU first asserted that fraud relating to VAT constitutes serious fraud affecting the EU's financial interests. Second, it held that the Italian rules on the interruption of limitation periods were incompatible with the obligations under Art. 325 TFEU requiring Member States to effectively combat EU fraud. The CJEU mainly eyed Art. 160 and 161 of the Italian Penal Code, which stipulate that, if the limitation period is interrupted, it may under no circumstances be extended by more than a quarter of its initial duration. Given the complexity and duration of the criminal proceedings in serious VAT fraud cases, this results in *de facto* impunity for such fraud, according to the CJEU. Ultimately, the Court ruled that

the national courts are required, if need be, to disapply the contested provisions of national law on the limitation period in order to give full effect to Art. 325 TFEU (see also eucrim 4/2015, p. 80).

Instead of following the CJEU ruling, some Italian courts had reservations about the conformity of the CJEU's findings with supreme principles of the Italian constitution. These arguments were shared by the ICC, which is now essentially asking the CJEU to reconsider its ruling in *Taricco I*. Although the cases at issue (C-42/17, *M.A.S., M.B.*) concern the protection of the EU's financial interests, the request for a preliminary ruling by the ICC tackles fundamental questions on the relationship between EU law and national constitutional law, the realm of constitutional national identity, the level of protection of fundamental rights, and the effectiveness of EU law. The ICC mainly put forward the following arguments.

The *Taricco* judgment collides with the principle of legality as enshrined in Art. 25(2) of the Italian Constitution, which also covers limitation rules applicable to the concrete offence. The ICC points out that the rules on limitations in criminal matters are characterised as substantive rules in the Italian legal order, forming an integral part of the legality principle. It follows that they cannot be applied retroactively to the detriment of the accused. As a result, the ICC found:

- The *Taricco* judgment is based on vague criteria, which is contrary to the principle of legal certainty;
- The rules laid down in the *Taricco* decision are incompatible with the principles governing the separation of powers.

Against this background, the ICC believes that the Italian courts may disregard the CJEU's ruling in *Taricco* on the following grounds:

- The established obligation breaches an overriding principle of the constitutional order (Art. 25 of the Italian Constitution) and is consequently capable of affecting the national and, in particular,

the constitutional identity of the Italian Republic, which is protected by Art. 4(2) TEU;

- Art. 53 EUCFR authorises Italy to apply a higher standard of fundamental rights protection guaranteed by the Italian Constitution than the one resulting from the interpretation of Art. 49 EUCFR.

AG *Bot* rejects all these arguments. In his opinion, Italy must strictly follow the rationale of the CJEU's *Taricco* ruling. He states that the Italian rules on the limitation periods in Art. 160/161 of the Italian Penal Code set absolute limits, which are insufficient to effectively protect infringements against the EU budget. Because of the primacy of EU law and, in particular, the principle of effectiveness as enshrined in Art. 325 TFEU, the resulting risk of impunity must be discarded.

In addition, the AG proposes interpreting the term “interruption of the limitation period” autonomously. It should be defined as meaning that each investigative act and each act that necessarily extends it interrupts the limitation period. Said act then causes a new period to begin (identical to the initial period), while the limitation period that has already elapsed is then cancelled.

As to the arguments of the ICC to disregard the CJEU's judgment, the AG clarifies that the only yardstick to measure a fundamental rights infringement is the EUCFR. Referring to the case law of the ECtHR, he concludes that limitation rules must be classified as “procedural law.” Therefore, neither Art. 49 EUCFR nor Art. 7 ECHR do not prevent Italy from applying longer limitation periods to pending cases.

The AG continues by arguing that Art. 53 EUCFR does not allow the Italian courts to ignore the obligations as set by the CJEU in the *Taricco* judgment, since the norm is that the level of protection must safeguard the primacy and effectiveness of EU law.

Ultimately, the AG states that Art. 4(2) TEU also does not allow for

a refusal because the immediate application of a longer limitation period is incapable of compromising the constitutional identity of the Italian Republic.

The opinion has already triggered several critical statements in legal literature. They point out *inter alia* the AG's failure to strike the right balance between fundamental rights protection and the effectiveness of EU law in the field of the EU's financial interests – a too vague and generic argumentation based on the existence of a systematic risk of impunity and a shift from the realm of interpretation to the domain of law-making by the European judiciary. By setting aside the constitutional identity clause, a constitutional clash may likely occur.

If the arguments of the AG are followed by the CJEU, the ICC will definitely be disappointed. The ICC has already announced that, in this case, it may resort to the counter-limits doctrine and oppose the enforcement of the CJEU's judgment. (TW)

►eucrim ID=1703028

Tax Evasion

CJEU Determines Conditions for Listing Persons to Combat Tax Fraud

On 27 September 2017, the CJEU published a notable judgment that pertains to the conditions for tax collection and effective combating of tax fraud, on the one hand. On the other, it concerns the protection of fundamental rights as well as the legitimacy of processing personal data in the public interest.

In the case at issue (C-73/16, *Peter Puškár*), Mr. *Puškár* demanded that the Finance Directorate and the Financial Administration Criminal Office of Slovakia remove his name from a list of persons considered front-men in company directorship roles and who are referred to internally as “*biele kone*” (“white horses”). The data in the list is useful for collecting taxes and combat tax fraud. Mr. *Puškár* obtained the list

without the consent of the responsible Slovakian tax authorities.

During the main proceedings in Slovakia, a clash occurred between the Supreme Court and the Constitutional Court of the Slovak Republic. The Supreme Court dismissed as unfounded the actions brought by Mr. *Puškár*, *inter alia* on procedural grounds, because he had not exhausted the remedies before the national administrative authorities. The Constitutional Court held, however, that in doing so the Supreme Court infringed the applicant's fundamental rights as provided for by the ECHR and as interpreted by the ECtHR.

After the case had been referred back to the Supreme Court of Slovakia, the court sought guidance from the CJEU on the following issues:

- A possible infringement of the applicant's fundamental rights, because he had not exhausted prior remedies before the administrative authorities;
- Whether it is in line with EU law if the Slovak court rejects the contested list as evidence, because it was obtained without the consent of the person/authority responsible for the processing of data;
- Whether the establishment of the contested list by the Slovak tax authorities is illegal;
- Which European court must be given preference if the ECtHR and the CJEU differ on the approaches to the protection of the person's fundamental rights?

The CJEU made some preliminary observations and stated that the case at issue falls within the scope of Directive 95/96/EC on the protection of natural persons with regard to the processing of personal data. In particular, the exception stipulated in Art. 3(2), first indent of the Directive does not apply, since the data are not specifically collected for the pursuit of criminal proceedings or in the context of the State's activities in the area of criminal law.

As to the first question, the CJEU concluded that, in principle, Art. 47 CFR does not preclude national legis-

lation, which makes the exercise of a judicial remedy by a person stating that his right to protection of personal data guaranteed by Directive 95/46 has been infringed subject to the prior exhaustion of the available administrative remedies. However, the national court must examine whether the practical arrangements for the exercise of such remedies do not disproportionately affect the right to an effective remedy before a court pursuant to Art. 47, 52(1) CFR. As a result, the prior exhaustion of the available administrative remedies (1) may not lead to a substantial delay in bringing a legal action, (2) involves suspension of the limitation period of the rights concerned, and (3) does not involve excessive costs.

The CJEU examined the second question in a similar way and clarified that Art. 47 CFR, in principle, precludes the rejection of the contested list as evidence of an infringement of the data protection rights conferred by Directive 95/96 – even if the data were obtained without legally required consent by the responsible person. A rejection may be possible, however, if it is laid down by national legislation and respects both the essential content of the right to an effective remedy and the principle of proportionality. It is therefore up to the national court to weigh up the interests at stake on a case-by-case basis.

As far as the third question is concerned, the CJEU decided that Directive 95/96, in principle, does not preclude the drawing up of a list of persons who might violate tax rules. However, the CJEU clarified that the contested list infringes the concerned persons' rights, e.g., the presumption of innocence as set out in Art. 48(1) CFR or the freedom of enterprise as enshrined in Art. 16 CFR. Furthermore, Art. 7(e) of Directive 95/96 inextricably links the objective of the processing of personal data to the task of the controller. Consequently, the CJEU sets conditions such that the infringement of fundamental rights can be considered proportional:

- The competent authorities in the tax

administration were invested by the national legislation with tasks to be carried out in the public interest within the meaning of Art. 7(e) of the Directive 95/46;

- The drawing-up of the list and the inclusion of names of data subjects is, in fact, appropriate and necessary for the purpose of achieving the objectives pursued;

- There are sufficient grounds to suspect that the data subjects are rightly justifiably included in the list.

In addition, the CJEU requires that all conditions for the lawfulness of the processing of personal data imposed by Directive 95/46 be satisfied with regard to the confidential listing.

Ultimately, the CJEU did not touch upon the delicate fourth question (which European court to follow?) because it held this question inadmissible in the present case. (TW)

► eucrim ID=1703029

Non-Cash Means of Payment

Commission Proposes New Directive on Tackling Non-Cash Payment Fraud

On 13 September 2017, as part of the framework of boosting cybersecurity in the EU, the Commission tabled a proposal for a Directive on combating fraud and counterfeiting of non-cash means of payment (COM(2017) 489 final). The Directive would replace a Framework Decision that dates back to 2001. The Commission is of the opinion that Framework Decision 2001/413/JHA no longer reflects today's challenges and technological developments, such as virtual currencies and mobile payments. It noticed that, despite EU legislation in place, fraud using cards issued in the Single European Payment Area (SEPA) is increasing with a damage of €1.44 billion in 2013.

The new Directive intends to provide effective EU cyber deterrence and a criminal law response by the following new issues:

- Expanding the scope of the offences, including transactions through virtual currencies;

- Introducing new online crime offences;

- Introducing a minimum level for the highest penalties (2-5 years);

- Clarifying the scope of jurisdiction;

- Ensuring the rights of victims;

- Improving EU-wide criminal justice cooperation;

- Providing statistical data on fraud via non-cash means of payment.

The proposal for a Directive on combating the fraud and counterfeiting non-cash means of payment is a further step towards improving the criminal law response to cyberattacks. It is also part of the Commission's "cybersecurity package" presented on 13 September 2017 (see below under "Cybercrime"). The Directive is designed to increase the level of harmonisation of EU criminal law in this field of criminality. (TW)

► eucrim ID=1703030

Network against Payment Card Fraud

Led by Europol, law enforcement officers from EU Member States and 10 ASEAN countries (Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam) created a new Investigative Network of Law Enforcement Specialists to combat payment card fraud. ASEANAPOL and INTERPOL additionally support the initiative, assisted by the European Association for Secure Transactions (EAST). (CR)

► eucrim ID=1703031

Counterfeiting & Piracy

2017 Annual Report on Counterfeit Seized Goods

On 20 July 2017, the Commission presented the results of customs actions at the EU's external borders regarding the enforcement of intellectual property rights (IPR) in 2016. The annual report

contains statistical information about the number of counterfeit goods seized by customs authorities and detentions made under customs procedures. It also includes data on the categories of goods detained, their provenance, the means of transport to ship them, and the type of intellectual property rights involved. The information is based on data submitted to the Commission by the Member States' customs administrations. The main results of the 2016 report are as follows:

- The number of fake and counterfeit products that were detained at the EU's external borders increased to more than 41 million articles in 2016;

- The goods had a total value of over €670 million;

- Most goods were consumer articles ordered by means of e-commerce, e.g., shoes, clothing, and accessories;

- Everyday products that are potentially dangerous to health and safety (food and drink, medicines, toys, and household electrical goods) accounted for over one third of all intercepted goods (34.2%) – a significant increase compared to 25.8% in 2015;

- Cigarettes remain the top category of "articles detained" (24%), toys are the second largest group (17%), followed by foodstuffs (13%) and packaging material (12%);

- 80% of fake/counterfeit articles arrived from China in 2016, making China the country where most counterfeit goods still originate. However, the countries of provenance vary, depending on the specific product categories;

- Large amounts of cigarettes come from Vietnam and Pakistan. Singapore was the top source for counterfeit alcoholic beverages, while Iran was the main source country for fake clothing accessories. Hong Kong led the category for counterfeit mobile phones and CDs/DVDs. India topped the list for counterfeit medicines;

- Germany and Belgium remain at the top of the list of EU countries with the highest number of cases of IPR infringe-

ments whereas there has been a significant decrease of such infringements in the United Kingdom compared to 2015. Lithuania, the Czech Republic, and Belgium lead the EU countries with the most articles detained.

The IPR enforcement report has been issued since 2000 (for the 2015 report, see eucrim 3/2016, p. 128). It is a valuable tool in the analysis of IPR infringements and the streamlining of future actions. (TW)

►eucrim ID=1703032

Example of Successful Cooperation Against Fake Products: Joint Customs Operation “Wafers”

On 3 July 2017, OLAF reported on a major Joint Customs Operation, code-named Operation Wafers, which illustrates how harmful counterfeit articles can be for the consumer. The operation – coordinated by the Dutch Customs, with the support of OLAF and Europol, and involving customs services in 12 EU Member States – targeted counterfeit semiconductors imported into the EU from China and Hong Kong. More than one million counterfeit devices, such as diodes, LEDs, transistors, and integrated circuits, were seized.

OLAF reported that the incorporation of the counterfeit semiconductors into electronic products could have led to the failure of computer systems and caused serious malfunctions of sensitive infrastructures, whether civilian or military. Danger to human health was also at stake, because some of the counterfeit semiconductors seized could have been ended up in automobiles or airplanes or could even have made their way into hospitals as part of surgical instruments. Moreover, the smuggling of counterfeit products causes serious financial damage to the European industry.

OLAF focused particularly on the smuggling of potentially dangerous products. The Office gave its financial, technical, and logistical support, providing the participants with a secure platform by which to share information dur-

ing the operation. Dutch customs were in charge of the preparatory work and the coordination of the operation. (TW)

►eucrim ID=1703033

Operation against Illicit and Counterfeit Medicines and Medical Devices

Between 12 and 19 September 2017, an operation led by Interpol and supported by Europol led to 400 arrests worldwide and to the seizure of 25 million illicit and counterfeit medicines worth more than USD 51 million. Further illicit medical devices, e.g., dental devices, implants, condoms, syringes, medical testing strips, and surgical equipment, worth an estimated USD 500,000 were recovered.

197 police, customs, and health regulatory authorities from 123 countries participated in this operation (Operation Pangea X) targeting the illicit online sale of medicines and medical devices.

In its almost 10 years of existence, Operation Pangea has seen a steady increase in the growth of unauthorised and unregulated online pharmacies. (CR)

►eucrim ID=1703034

ECB Reports on Euro Banknote Counterfeiting

On 21 July 2017, the European Central Bank (ECB) reported on Euro banknote counterfeiting in the first half of 2017. 331,000 counterfeit Euro banknotes were withdrawn from circulation, which corresponds to the number of withdrawn banknotes in the first half of 2016.

The €20 and €50 notes continued to be the most often counterfeited banknotes. Together, they accounted for 85% of the counterfeits.

The ECB stressed that the likelihood of receiving a counterfeit Euro banknote is minimal. The number of counterfeits remains very low compared with the number of genuine banknotes in circulation (currently, there are over 20 billion Euro banknotes in circulation, with a total value of more than €1.1 trillion).

The ECB also pointed out that Euro

banknotes continue to be a trusted and safe means of payment. Nonetheless, everybody is encouraged to check received banknotes by using the simple “feel, look, and tilt” method described in “The Euro” section on the ECB’s website. The Eurosystem (the ECB and the 19 national central banks of the Euro area) continues its efforts to help people identify counterfeit banknotes. Professional cash handlers are encouraged to use banknote-handling and processing machines to reliably identify and withdraw counterfeits from circulation. (TW)

►eucrim ID=1703035

Cybercrime

Commission Tables “Cyber Security Package”

Following the annual State of the Union Address by Commission President *Jean-Claude Juncker*, in which he pledged to better equip Europe against cyberattacks (see news item above under “Foundations > Reform of the EU”), the Commission presented several documents scaling up its response to cyberattacks and cybercrime.

The “cyber security package” intends to react to the changing world of digital threats. They include a 300% increase in ransomware attacks since 2015; 80% of European companies were affected by ransomware attacks last year. Studies reveal that the economic impact of cybercrime rose fivefold from 2013 to 2017 and may rise further by a factor of four by 2019.

Beyond the rise in cyber-criminal activity by means of ransomware, a Eurobarometer survey revealed that the vast majority of European citizens consider cybercrime an important challenge to the EU’s internal security. Most of all, citizens have voiced concerns about discovering malicious software on their devices, identity theft, and bank card and online banking fraud. In addition, state actors are increasingly using cyber tools

to meet their geopolitical goals, and cyber security incidents are diversifying.

In order to tackle all these phenomena, the Commission's cyber security package will make the EU more resilient against cyberattacks and create effective cyber deterrence, also through criminal law. The package builds on existing instruments and presents new initiatives to further improve the EU's response in the following areas:

- Building EU resilience to cyberattacks and stepping up the EU's cyber security capacity;
- Creating an effective criminal law response;
- Strengthening global stability through international cooperation.

The package consists of the following proposals, some of which are presented in more detail in the following news items:

- Strengthening the European Union Agency for Network and Information Security (ENISA) and giving it a strong mandate as an "EU Cyber Security Agency";
- Creating an EU-wide cyber security certification framework;
- Setting up a "Blueprint" on how to respond to large-scale cyber security incidents and crises;
- Establishing a European Cyber Security Research and Competence Centre;
- Putting forward a new Directive on the combatting of fraud and counterfeiting of non-cash means of payment;
- Introducing a framework for a "Joint EU Diplomatic Response to Malicious Cyber Activities" and taking measures to strengthen international cooperation on cyber security.

With a view towards stepping up effective investigation and prosecution of cyber-enabled crime, the Commission announced a proposal to facilitate cross-border access to electronic evidence at the beginning of 2018. In addition, the Commission will soon present its reflections on the role of encryption in criminal investigations. (TW)

►eucrim ID=1703036

EU Cybersecurity Agency and Cybersecurity Certification Framework

In order to scale up the EU's response to cyberattacks, improve cyber resilience, and increase trust in the Digital Single Market, a regulation for institutional capacity building is a central proposal in the Commission's cybersecurity package (see news item above). The proposed regulation will cover two aspects:

- A European Union Cybersecurity Agency, building on the existing European Agency for Network and Information Security (ENISA), designed to improve coordination and cooperation across Member States and EU institutions, agencies, and bodies;
- The establishment of an EU cybersecurity certification framework to ensure the trustworthiness of the billions of devices ("Internet of Things") that drive today's critical infrastructures, such as energy and transport networks.

The ENISA reform mainly involves conferring more tasks, awarding a permanent status, and equipping the Agency with adequate resources, i.e., a gradual increase in staff and budget. The main purpose of the Agency is to assist EU Member States in implementing the Directive on the Security of Network and Information Systems (NIS), which clarifies the reporting duties of national authorities in serious incidents. As part of its new mandate, ENISA will also have to support the Commission and the Member States in overall cybersecurity policy and in key strategic sectors, such as energy, transport, and finance. Other tasks could include:

- Being the one-stop shop (infohub) for cybersecurity information from the EU institutions and bodies;
- Taking on more operational functions, particularly by cooperating in the network of Computer Security Incident Response Teams (CSIRTs) and by providing assistance to Member States when handling incidents;
- Improving capabilities and expertise, for instance on the prevention of and response to incidents.

In addition, ENISA will play an important role in the field of the EU's new cybersecurity certification scheme.

The proposals for the EU cybersecurity certification framework for ICT products, systems, and services aims at replacing the current national schemes. At present, multiple certifications lead to barriers and separate certification processes in the various EU countries. Because of the diverse products and services, the EU framework is expected to deliver numerous individual European cybersecurity certification schemes with clear descriptions of security requirements to be met. A confirmation of compliance with such requirements will be recognised in all EU Member States, thus making it easier for businesses to trade across borders and for purchasers to understand the security features of products or services. Although the use of the certification scheme will remain voluntary for companies, the Commission anticipates competitive advantages and the encouragement of "cybersecurity by design."

The legislative proposal for a Regulation in these two areas (COM(2017) 477 final) is accompanied by several impact assessments, an impact assessment summary, and a Commission's staff working paper. The proposed Regulation must now be negotiated by the Council and the European Parliament. (TW)

►eucrim ID=1703037

Assessment of EU Directive on Attacks Against Information Systems

On 13 September 2017, on the occasion of the Commission's "cybersecurity package" (see news above), it published an implementation report on the necessary measures taken by EU Member States in order to comply with Directive 2013/40/EU on attacks against information systems and replacing Council Framework Decision 2005/222/JHA. The report is not only required according to Art. 17 of the Directive, but is also part of the Commission's strategy of creating an effective criminal law response to cybercrime.

The Directive approximates the criminal law of the Member States in the area of attacks against information systems and aims to improve cooperation between competent authorities. This is accomplished by establishing minimum rules on the definition of criminal offences and sanctions in the area of attacks against information systems and by requiring operational 24/7 points of contact.

It should be noted that Denmark is not bound by the Directive because of the country's "opt-out" in European criminal justice. All other EU Member States (including the UK and Ireland, which decided to opt in) had to transpose the Directive by 4 September 2015. The Commission notes, however, that by 31 May 2017, infringement procedures for non-communication of national transposition measures were already pending against Belgium, Bulgaria, and Ireland. In the meantime, Ireland reported that it had fully transposed the Directive by 31 May 2017. However, this the Commission was not able to take this into account in its report.

In conclusion, the Commission acknowledges major efforts on the part of EU Member States to transpose the Directive's obligations, which mainly consist of amending criminal codes and other relevant legislation, streamlining procedures, and setting up or improving cooperation schemes. However, the Commission sees potential for further improvement in the following areas:

- Use of definitions (Art. 2 of the Directive), which has an effect on the scope of offences defined by national law on the basis of the Directive;
- Inclusion of all possibilities for defining actions in relation to offences (Art. 3 to 7) and inclusion of common standards of penalties for cyberattacks (Art. 9);
- Implementation of administrative provisions on appropriate reporting channels (Art. 13(3));
- Monitoring and statistics for the offences included in the Directive (Art. 14).

The Commission ultimately states that it currently sees no need to propose amendments to the Directive. Instead, it will focus legislative action on improving cross-border access to electronic evidence for criminal investigations (proposal envisaged for the beginning of 2018). Furthermore, it will present a report on the role of encryption in criminal investigations. (TW)

► eucrim ID=1703038

Preventive Measures Against Cyber-Attacks

On 13 September 2017, the Commission also released a recommendation for a coordinated EU response to cyberattacks (the Blueprint) within the framework of its "cyber security package" (see above). The purpose of the Blueprint is to allow the EU to implement a well-rehearsed plan in order to react to a large-scale cyber incident or crises (like the "WannaCry" and "Petya" in the past). In particular, the recommendation details how existing crisis mechanisms can interact with the existing cybersecurity entities at the EU level and how the competent authorities at the EU level and national levels should communicate. In this context, the Computer Security Incident Response Teams (CSIRTs) as established by the NIS Directive, ENISA, and the European Cybercrime Centre at Europol will play a vital role. Furthermore, the Blueprint will set up mechanisms to identify the cause of cyberattacks in order to effectively mitigate and manage the causes.

In addition to the Blueprint, the Commission proposes investing in the creation of a Cybersecurity Competence Network with a European Cybersecurity Research and Competence Centre at its heart. Building such capacities is considered essential in order to gain the necessary expertise to achieve autonomy in cybersecurity technology and to protect the digital economy and society as a whole. The Commission is preparing an impact assessment on how the structures could look like. In this context, the

Commission has proposed a pilot under the Horizon2020 Programme, with available funding of €50 million in the short term. (TW)

► eucrim ID=1703039

Commission Urges IT Platforms to Better Remove Illegal Content Online

On 28 September 2017, the Commission presented a Communication "tackling illegal content online – towards enhanced responsibility of online platforms." The objective of the communication is to increase the proactive prevention, detection, and removal of illegal content inciting hatred, violence, and terrorism online by private IT companies.

The communication provides a set of guidelines and principles for online platforms on how they can live up to their responsibility for tackling the illegal content they host. It also mainstreams the implementation of good practices for preventing, detecting, removing, and disabling access to the different forms of illegal content, while at the same time safeguarding transparency and fundamental rights, such as free speech. Furthermore, the Commission wishes to promote cooperation between the platforms and competent authorities.

The Commission proposes tools for swifter and more proactive action on the part of the platforms in the following areas:

- Detection and notification of illegal content;
- Effective removal;
- Prevention of reappearance.

It is expected that the platforms will take *inter alia* the following actions:

- Appoint points of contact and ensure that they can be contacted rapidly to remove illegal content, so that closer cooperation with competent national authorities is established;
- Work closely with "trusted flaggers," i.e., specialised entities with expert knowledge on what constitutes illegal content (privileged relationship);
- Invest in automatic detection technologies;

- Remove illegal content as quickly as possible under certain circumstances (e.g., incitement to terrorism) within specific timeframes;
- Set up a policy of transparency, detailing also the numbers and types of notices received;
- Introduce safeguards for the prevention of over-removal;
- Take measures to dissuade the user from repeatedly uploading illegal content;
- Develop and use automatic tools to prevent the reappearance of illegal content online.

The Communication is based on self-regulation because it is not binding for IT companies. However, the Commission is expecting considerable progress from the platforms during the next months, and it will assess whether additional measures are needed by May 2018. It will then decide whether possible legislative measures could be put in place in order to complement the existing framework.

It should be noted that the EU has already taken several legislative and non-legislative measures to cope with the challenge of illegal content online. These include, in particular, sector-specific measures, such as the Directive to combat the sexual abuse and sexual exploitation of children and child pornography and the Directive on combating terrorism. On 31 May 2016, a Code of Conduct on countering illegal online hate speech was concluded with Facebook, Twitter, YouTube, and Microsoft. The EU Internet Forum, launched in December 2015, established a partnership with major Internet companies to stop the abuse of the Internet by terrorist groups. (TW)

►eucrim ID=1703040

Detection and Flagging of Terrorist Content on the Internet

In a joint operation against online terrorist propaganda conducted by Europol, EU Member States, and third parties from 13 and 14 September 2017, 1029 pieces of content promoting terrorism on the Internet were identified. The opera-

tion mainly focused on the online production of terrorist materials by IS and al-Qaeda affiliated media.

The operation allows the conclusion to be drawn that jihadist organisations and their supporters continue to abuse a variety of platforms in order to disseminate their propaganda. They tend to gravitate towards smaller platforms due to the interceptive action undertaken by certain service providers to safeguard their platforms. For the same reason, some jihadist sympathisers have reverted to the use of forums for communication and propaganda purposes instead of using social media. Darknet libraries that share links directing users to terrorist content in the open web also seem to be on the rise. Pro-IS user-generated content indicates that the so-called Islamic State continues to have a solid basis of dedicated supporters in the virtual environment of the Internet. (CR)

►eucrim ID=1703041

No More Ransom Initiative Takes Stock

The No More Ransom initiative celebrated its first anniversary this July (see also eucrim 4/2016, p. 162 and 3/2016, p. 128).

Initially kicked-off by the Dutch National Police, Europol, McAfee, and Kaspersky Lab, the initiative today has 109 partners. Furthermore, four new law enforcement agencies from Czech Republic, Greece, Hong Kong, and Iran have joined the initiative.

The platform is available in 26 languages and counts 1.3 million single visits since its inception. It includes 54 decryption tools, provided by nine partners and covering 104 ransomware types (families). Over the past year, more than 28,000 devices were decrypted with the help of these tools, depriving cybercriminals of an estimated €8 million in ransom. (CR)

►eucrim ID=1703042

AlphaBay and Hansa Taken Down

This July, the largest and third-largest criminal marketplaces on the Darknet,

AlphaBay and Hansa, were taken down in two operations led by the Federal Bureau of Investigation (FBI), the US Drug Enforcement Agency (DEA), and the Dutch National Police with the support of Europol. These marketplaces were responsible for the trading of over 350,000 illicit commodities, including drugs, firearms, and cybercrime malware.

AlphaBay reached over 200,000 users and 40,000 vendors, with over 250,000 listings for illegal drugs and toxic chemicals and over 100,000 listings for stolen and fraudulent identification documents and access devices, counterfeit goods, malware and other computer hacking tools, firearms, and fraudulent services. Hansa traded similarly high volumes in illicit drugs and other commodities. (CR)

►eucrim ID=1703043

Racism and Xenophobia

Muslim Immigrants in the EU (EU-MIDIS II Report)

In September 2017, FRA published selected findings on Muslims, based on its Second European Union Minorities and Discrimination Survey (EU-MIDIS II). The report examines the views and experiences of first-generation and second-generation Muslim immigrants living in 15 EU Member States, focusing on discrimination and racist victimisation.

According to the report, there has been little progress in terms of discrimination and hate crime over the last 10 years. For instance, nearly one in three Muslim respondents indicated that they had suffered discrimination when looking for a job. Furthermore, 1 out of 4 of the respondents is familiar with harassment due to ethnic or immigrant background. Rates for discrimination, harassment, or police stops are considerably higher for those wearing visible religious symbols than for those who do not. About half of the respondents reported that individual names, skin colour, or physical appearance prompted discrimination when

looking for housing, work, or receiving healthcare. Only 1 out of 10 Muslim respondents reported a recent incident of harassment motivated by hatred to either the police or another organisation or service. (CR)

► eucrim ID=1703044

First Meeting of European Commission's Radicalisation Expert Group

By its decision of 27 July 2017, the Commission set up a high-level expert group on radicalisation. Its mission is to enhance efforts to prevent and counter radicalisation leading to violent extremism and terrorism as well as to improve coordination and cooperation between all relevant stakeholders.

The participants explored how the Commission could work with Member States to more effectively tackle the problem of radicalisation and violent extremism from different angles. The FRA reported on its EU-MIDIS II survey which deals with Muslim respondents' experiences of everyday life and discrimination (see also news item above). The FRA included the respondents' experiences with policing and their trust in the authorities. (TW)

► eucrim ID=1703045

Procedural Criminal Law

Procedural Safeguards

CJEU: Penal Orders Are an Essential Document and Must be Notified with Translation

On 12 October 2017, the CJEU confirmed that penal orders in the sense of German criminal procedure (*Strafbefehle*) constitute an essential document that must be translated under EU law (Art. 3 Directive 2010/64). The CJEU follows the arguments of AG *Wahl* in the preliminary ruling proceedings initiated by the Regional Court of Aachen, Germany in case C-278/16, *Frank Sleutjes*

(for more details on the case and its legal problems, see eucrim 2/2017, p. 71).

The CJEU argues that an individual with no command of the language of the court proceedings in question, is not able to exercise his rights of defence effectively if he is not provided with a translation of the penal order in a language that he understands.

The consequence of the ruling is, in essence, that serving a penal order without full translation into a language that the defendant understands is void. Hence, the period for opposing the order does not begin to run.

After rulings in the cases *Covaci* (C-216/14) and *Tranca/Reiter/Opria* (C-124/16 et al.), the present case is the third ruling of the CJEU on the interpretation of the new EU Directives on safeguarding procedural rights in the context of the German penal order procedure (*Strafbefehlsverfahren*). It is a significant simplified procedure allowing for the unilateral and rapid disposal of a case without trial and formal judgment for trivial and medium offences. Possible penalties include fines; under certain circumstances, the penal order may also impose imprisonment not exceeding one year if it is suspended on probation. (TW)

► eucrim ID=1703046

Data Protection

CJEU Topples EU-Canada PNR Agreement

On 26 July 2017, the CJEU rendered another landmark decision in the field of European data protection law. As already recommended by AG *Paolo Mengozzi* (see eucrim 3/2016, p. 129), the Grand Chamber of the CJEU stated that the envisaged agreement between the EU and Canada on the transfer and processing of Passenger Name Record (PNR) data cannot be concluded in its current form, because a number of its provisions are incompatible with the EU's fundamental rights to respect for private life (Art. 7

CFR) and to the protection of personal data (Art. 8 CFR).

The CJEU puts forth that the transfer of PNR data from the EU to Canada as well as the rules laid down on the retention of data, their use, and their possible subsequent transfer to other public authorities amount to an interference with the mentioned fundamental rights. Since these rights are not absolute, the interference may be justified. This could entail ensuring public security in the context of fighting terrorism and other serious international crime. From the perspective of proportionality, however, the Court found that several provisions of the draft are not strictly necessary and do not lay down clear and precise rules. The CJEU bases this finding particularly on two considerations:

- First, the transfer of sensitive data (i.e., information that reveals racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, or a person's health or sex life), made possible under the agreement, lacks a solid justification. Justification of the transfer must be based on grounds other than the protection of public security against terrorism and serious transnational crime;
- Second, regarding data retention, the CJEU makes a distinction between the different situations of the passengers. It argues that the draft agreement does insufficiently regulate the circumstances and conditions under which Canadian authorities can use PNR data during the air passenger's stay in Canada. In this context, the CJEU generally requires that the use of retained PNR data during the passenger's stay be subject to prior review by a court or an independent administrative body. In the Court's view, the systematic and general storage of the PNR after the departure of the passengers from Canada is not necessary. In this event, data retention for the envisaged period of five years is only permissible if objective evidence exists from which it can be inferred that an air passenger may present a risk in terms of

terrorism or serious transnational crime.

The CJEU also considers other provisions of the draft EU-Canada PNR agreement incompatible with fundamental rights and gives concrete guidance on what a revision should look like. For instance, the Court clarified that the further transfer of PNR data from Canadian authorities to law enforcement authorities in non-EU countries requires a level of data protection that is “essentially equivalent” to that under EU law: either an equivalent PNR agreement must be in place or an adequacy decision of the Commission is needed.

The statement of the CJEU on the EU-Canada PNR deal took the form of an opinion (1/15), since the EP had asked the Court to examine the legality of the envisaged provisions before giving its consent to the international agreement.

Opinion 1/15 is also important because it not only supplements previous CJEU case law on EU data protection standards (such as the rulings in *Schrems*, *Digital Rights Ireland*, *Tele 2 Sverige/Watson*, and *Google Spain*) but also – for the first time – sets out the circumstances and conditions under which international agreements may be used to legalise international data transfers.

Therefore, it can be considered a crucial standard-setter in the field of transnational data exchange in the field of law enforcement. As a result, the findings may impact the scrutiny of other existing PNR agreements of the EU (currently with Australia and the USA) or future negotiations in this field (currently ongoing with Mexico). They may also influence secondary EU law, such as the PNR Directive (for details on this instrument, see eucrim 2/2016, p. 78) or even the planned Exit/Entry-System (see also the following news items). (TW)

► eucrim ID=1703047

Follow-up to CJEU's Opinion on EU-Canada PNR Agreement

Following Opinion 1/15 by which the CJEU stopped the final conclusion of the agreement between the EU and Canada

on the transfer and processing of PNR data (see above news item), the EP's LIBE Committee posed several detailed questions to the Commission in a letter dated 9 October 2017 that was addressed to First Vice-President *Frans Timmermans*. The LIBE Committee wishes to learn more about the implications of the Court's opinion on the exchange of PNR data with Canada, on PNR agreements with other countries, on the EU PNR Directive, and on other legal instruments and legal proposals.

Timmermans replied to the questions in a letter on 18 October 2017 and clarified the following issues:

- Transfers of PNR data from EU Member States to Canada can continue on the basis of commitments given by Canada; they were initially designed to bridge an interim period in which no international agreement by the EU is concluded;
- The interim situation can be upheld since the CJEU's Opinion only refers to the envisaged conclusion of the PNR agreement between the EU and Canada;
- The Commission will not enter into an immediate revision of the existing PNR agreements with the USA and Australia;
- The Member States' obligations deriving from the EU PNR Directive are not affected by the CJEU's Opinion;
- Opinion 1/15 has no direct, automatic impact on other legal instruments or proposals (such as the Entry/Exit System, ETIAS, the EU-US Umbrella Agreement, or the EU-US Privacy Shield), since their objectives, scope, and nature are different compared to PNR.

On 18 October 2017, the Commission also addressed a recommendation to the Council asking for authorisation to negotiate a new PNR agreement with Canada, in accordance with the procedure under Art. 218 TFEU. An annex to the Commission document states the following:

“The Agreement should contain all the safeguards required in order for it to be compatible with Arts. 7, 8, 21 and 52 (1) of the Charter of Fundamental Rights of the European Union, as specified in

the Opinion 1/15 of the Court of Justice of the European Union of 26 July 2017. All other elements of the Agreement between Canada and the EU for the transfer and use of Passenger name Record (PNR) data signed on 25 June 2014 should not be affected.” (TW)

► eucrim ID=1703048

Expert Opinion: Data Retention under Planned EU Entry/Exit System Not in Line with CJEU's Opinion 1/15

A legal opinion, issued in October 2017, dealt with the question of whether and how the CJEU's recent Opinion 1/15 on the envisaged EU-Canada PNR Agreement (see above) impacts the Proposal for a Regulation on an EU Entry/Exit System (EES). The legal opinion was drafted by *Prof. Dr. Mark D. Cole* and *Teresa Quintel, LL.M.* from the University of Luxembourg, both experts in media and telecommunication law. The study had been commissioned by the EP's Greens/EFA Group, which – under the lead of German MEP *Jan Philipp Albrecht* – intended to influence the EP's vote on the Commission's EES proposal (see news above under “Schengen”).

Cole and *Quintel* clearly disagree with the Commission's view that the CJEU's Opinion of July 2017 on the PNR agreement with Canada has no impact on other legal instruments like the EES (see news item above). They analysed in detail the main finding in Opinion 1/15 and consulted earlier case law on data retention schemes before applying the identified principles to the context of data collection and retention in the planned EES.

They concluded that “strict necessity as condition for retention periods as well as the requirements for law enforcement access laid down by the CJEU are applied also for the EES.” According to the authors of the study, the planned EES Regulation does not fulfill these requirements – at least not as far as the proportionality of retention periods and (judicial or independent) review mechanisms are concerned.

Cole and *Quintel* also voiced concerns with regard to the EU's plans for the interoperability of databases. They strongly recommended establishing a standard model along the lines laid down by the CJEU, "in order to prevent fundamental rights violations, particularly, by means of automated processing of personal data and profiling of the individuals concerned." (TW)

► eucrim ID=1703049

FRA Assesses Interoperability of EU Information Systems

This July, FRA published a report looking at fundamental rights challenges in the context of current plans to make EU information systems interoperable in the areas of borders and security, such as Eurodac, SIS II, and VIS (see also eucrim 2/2017, p. 72). Such information systems cover mainly non-EU citizens, including short-term travellers, asylum seekers, and third-country nationals with criminal records.

The report takes a detailed look at the implications on the right to protection of personal data, the right to an effective remedy, the rights of children, the right to asylum, and the rights of migrants in an irregular situation. Furthermore, it evaluates the risk of unlawful profiling.

The report concludes that interoperability involves both risks and opportunities for fundamental rights. Interoperability leads to the possibility to receive a full-picture of a person, which may contribute to better decision-making. To benefit from the latter, the report emphasizes the need to put in place safeguards in order to ensure the quality of the information stored on the person concerned, the purpose of the data processing, and the prevention of unauthorised access to and unlawful sharing of information with third parties.

Opportunities of interoperability are mainly seen in supporting the detection of missing children or children subject to trafficking in human beings, and facilitate a targeted response. This requires the systematic recording of missing chil-

dren in SIS II, and an additional focus on child protection in the individual IT systems. Another benefit of interoperability can be the better respect for the principle of *non-refoulement* by ensuring that the status as an applicant for international protection is also visible when consulting other information systems. However, risks for discriminatory profiling must be reduced.

The report was originally prepared to support discussions in the high-level expert group on information systems and interoperability. The group was tasked with elaborating the legal, technical and operational aspects of options for achieving interoperability of information systems. (CR)

► eucrim ID=1703050

Freezing of Assets

JHA Ministers Discuss New Regulation on Mutual Recognition of Freezing and Confiscation Orders

At its meeting on 12 October 2017, the Ministers in the Justice and Home Affairs Council held a political debate on the new instrument on the mutual recognition of freezing and confiscation orders (for the proposed Regulation, see eucrim 4/2016, p. 165). They particularly discussed its scope, namely whether certain systems of preventive confiscation should also be covered by the proposed regulation, provided that the confiscation order is clearly linked to criminal activities and that appropriate procedural safeguards apply.

The Regulation will simplify the current framework by providing a single legal instrument with a broader scope of cross-border recognition rules. The speed and efficiency of freezing and confiscation orders will also be improved through the standardisation of documents and procedures. Lastly, the text ensures that victims' rights to compensation and restitution are respected in cross-border cases. (TW)

► eucrim ID=1703051

Cooperation

Police Cooperation

Portugal, Czech Republic, and Greece Can Launch Automated Data Exchange of Fingerprints

The Council adopted three implementation decisions that entitle Portugal, the Czech Republic, and Greece to launch the automated data exchange of dactyloscopic data pursuant to Council Decisions 2008/615 and 2008/616 JHA. This is also referred as the "Prüm framework," since the provisions of the Prüm Treaty of 2005 on stepping up cooperation in cross-border crime, in particular combating terrorism and illegal migration, were incorporated therein. The purpose was for all EU countries to benefit from improved judicial and police cooperation through the exchange of information. Decision 2008/615 allows *inter alia* the mutual automated access to DNA profiles, dactyloscopic data, and certain national vehicle registration data. (TW)

► eucrim ID=1703052

Judicial Cooperation

CJEU Clarifies Member States' Obligation Not to Extradite EU Citizens to Countries with Death Penalty

After the landmark ruling in the *Petruhin* case (C-182/15, see eucrim 3/2016, p. 131), the CJEU is now faced with several follow-up references detailing specific issues of the judgment. The present case (C-473/15) interestingly originated in a procedure before a civil court in Austria (District Court of Linz) involving the request for payment of damages due to cancellation of a contract on grounds of fear of being extradited.

In the main proceedings Peter Schott-höfer & Florian Steiner, a law firm based in Munich, invited Mr. Adelsmayr, an Austrian physician residing in Austria, to talk about his experiences in the Unit-

ed Arab Emirates. A court in Dubai had sentenced Mr. Adelsmayr to the death penalty, blaming him for the death of one of his patients while he was practising in a hospital in Dubai. Mr. Adelsmayr cancelled his attendance in Munich at short notice, because he was not sure whether the German authorities would extradite him to the United Arab Emirates or not. Due to the late cancellation, the Munich law firm requested the payment of a lump sum of €150, as stipulated in a contract concluded with Adelsmayr for his presentation. They argued that there was no reasonable ground for the cancellation, because Adelsmayr absolutely could not be extradited.

Against this background, the District Court of Linz referred several hotly debated questions to the CJEU, *inter alia* on whether the principle of non-discrimination laid down in Art. 18 TEU would necessitate an extension of the German constitutional right that own nationals cannot be extradited to citizens of other EU Member States, such as Austria.

However, the CJEU found that it need not to go into detail on all referred questions, since the main question at issue had already been ruled on by the Court. This also allowed the Court to decide by order instead of judgment. In its order of 6 September 2017, the CJEU makes reference to its *Petruhhin* judgment of 6 September 2016 and points out that the decision of a Member State to extradite a Union citizen – in a situation in which that citizen has made use of his right to move freely in the Union by moving from the Member State of which he is a national to another Member State (which includes travelling for the purpose of giving a presentation) – falls within the scope of Art. 18 and 21 TFEU and, therefore, of Union law in the sense of Art. 51(1) CFR. The CJEU concluded on this basis that German authorities had to refuse extradition to the United Arab Emirates, because Art. 19 CFR prohibits extraditing citizens to countries in which they run a serious risk of being subjected to the death penalty.

The question of what impacts the Union law provisions on non-discrimination and Union citizenship will have on the constitutional ban not to extradite German nationals to third countries (Art. 16(2) of the German constitution) has, however, also been posed in another reference for preliminary ruling from the Regional Court of Berlin (C-191/16, *Romano Piscioti*). Thus, the CJEU will have to reanalyse this question in the near future. (TW)

►eucrim ID=1703053

European Arrest Warrant

CJEU Interprets Refusal Ground of Trials *in absentia* in the Context of Appeal Proceedings

Trials *in absentia* in the Member State issuing a European Arrest Warrant (EAW) are not only a frequent cause for non-execution, but also for guidance sought by the European courts (see also the article by T. Wahl, (2015) eucrim, p. 70).

In case C-270/17 PPU (*Tada Tupikas*), the CJEU again had to interpret Art. 4a of the FD EAW (for the interpretation of the article, see also the judgment of the CJEU in case C-108/16 PPU, *Dworzecki* (eucrim 2/2016, p. 80) and the following news item). Art. 4a was introduced by Framework Decision 2009/299/JHA and lists, in a precise and uniform way, the conditions under which the recognition and enforcement of a decision in the issuing state (rendered following a trial in which the person concerned did not appear in person) may not be refused by the executing state.

In the case at issue, the Dutch authorities had been requested to execute an EAW for the purpose of enforcing a sentence of imprisonment imposed by a Lithuanian district court, but confirmed in appeal proceedings by the Regional Court of Klaipėda, Lithuania. The regional court dismissed the appeal of the defendant; however, the EAW did not contain any information on whether Mr. Tupikas appeared in person before it.

The referring court, the Rechtbank Amsterdam, observed that the regional court in Lithuania had the power to fully re-examine the conviction handed down at first instance. It therefore asked whether the conditions set out in Art. 4a of the FD EAW also apply to appeal proceedings. In other words, the CJEU had to interpret the concept of “trials resulting in the decision” within the meaning of Art. 4a(1) of the FD EAW.

In its judgment of 10 August 2017, the CJEU concludes that where the issuing Member State has provided for a criminal procedure involving several degrees of jurisdiction which may thus give rise to successive judicial decision, at least one of which has been handed down in *absentia*, the concept of “trials resulting in the decision” must be interpreted as relating only to the instance at the end of which the decision is handed down which finally rules on the guilt of the person concerned and imposes a penalty on him, such as a custodial sentence, following a re-examination, in fact and in law, of the merits of the case.

The CJEU justifies this result by taking into account the context of Art. 4a and the objectives of the EAW scheme. Interestingly, the CJEU seems to take a “defendant-friendly” approach when it concedes that “the principles of mutual trust and recognition on which the FD EAW is based must not in any way undermine the fundamental rights of the person concerned.” In addition, the CJEU states that “the person concerned must be able to fully exercise his rights of defence in order to assert his point of view in an effective manner and thereby to influence the final decision which could lead to the loss of his personal freedom.”

Nevertheless, the CJEU also takes a pragmatic view since it is up to the executing authority *only* to verify – if necessary by requesting additional information from the issuing authority – the appeal stage of the criminal proceedings. It must consider whether the conditions

Report

The 2017 Oxford Conference on International Extradition and the European Arrest Warrant

University of Oxford, Worcester College, England, 4–5 September 2017

Academic and practising lawyers from around the world gathered in Oxford, England to brainstorm on current developments in extradition law in several countries, including the UK, Canada, Australia, Germany, and Switzerland. A poll of participants indicated that virtually all attendees considered the two-day conference a “complete success,” according to *Cristina Saenz Perez*, University of Leicester.

The second edition of the global conference on International Extradition and the European Arrest Warrant (see *eucri* 3/2016, pp. 132–133 for the first edition) attracted experts from the United States, Canada, Australia, Singapore, the United Kingdom, and Continental Europe. High on the agenda was an examination of the comparative practice of extradition in several jurisdictions, the current state of the European Arrest Warrant (EAW) mechanism, and the consequences of Brexit for extradition rules in the UK.

Over the course of two days, the seminar sessions covered theory and practice regarding a number of domestic extradition laws. Note was taken that few universities, law societies, and bar associations around the world focus on extradition as an independent area of legal practice. No university in the world offers *ad hoc* programmes on international extradition. As a result, with the exception of the UK, no established class of extradition lawyers exists in most countries.

The seminar began with a comprehensive analysis of extradition law and court procedure in Germany by extradition expert *Thomas Wahl* from the Max Planck Institute for Foreign and International Criminal Law. He also discussed the current controversial issue of whether the constitutional ban not to extradite German nationals must be extended to *Union citizens*. The controversy ensued after the European Court of Justice’s judgment in *Petruhhin* and the recent request for a preliminary ruling by the Regional Court of Berlin in the *Pisciotti* case. In addition, he commented on the recent case law of the Federal Constitutional Court as regards the refusal ground of “*ordre public*.” He referred to the famous ruling of 15 December 2015, which opened “Pandora’s box” for defence lawyers to attack surrender requests by arguing that the law of another EU country is not in line with parallel German concepts. *Wahl* noted that the Court did a U-turn when it recently concluded that the drawing of negative inferences from the accused’s silence under English law does not hinder his/her surrender to the UK.

UK barrister *Mark Summers QC* of Matrix Chambers – who appears on a regular basis in extradition cases, including *Assange v. Sweden* in 2012 – outlined similarities and differences in the reading of EAW provisions (such as the definition of judicial authority, the issue of *res judicata*, and the effectiveness of sum-

mons) by the Court of Justice of the European Union and the UK Supreme Court. “Although several major differences persist, on several occasions the ECJ has often reached, over time, the very same conclusions of the UK courts,” said *Summers*. “On the domestic front, the last decade shows a fascinating and difficult tension between pro-surrender courts and a Parliament sceptical of, and determined to lessen the impact of this European mechanism.”

British solicitor *Rebecca Niblock*, co-author of the leading textbook “*Extradition Law*” (published by LAG, now in its 2nd edition) focused on the issue of bail and detention in EAW cases, especially in instances where other less intrusive alternatives are possible. *Niblock* also informed participants about the newly established association DELF – Defence Extradition Lawyers’ Forum. “DELf aims to represent defence lawyers practising in extradition by creating best working practices,” said *Niblock*.

An entire session was chaired by *Dr. Gary Botting*, a Canadian barrister and published expert on extradition law, who presented the documents that lawyers are given in Canada when a person is arrested in an extradition case, including the so-called “authority to proceed” or the “record of the case.” *Botting* illustrated the enormous challenges faced by lawyers defending extradition cases in Canada these days, as the discovery of information is truly minimal. He also reported on developments in the *Hassan Diab* case, which concerns a Canadian academic who was wrongly extradited from Canada to France in 2014.

Swiss lawyers *Gregoire Mangeat* and *Alice Parmentier* reported on the extradition rules in Switzerland. “In 2016 Switzerland requested the extradition of 282 individuals, and received requests for 372. These figures are in line with the practice of the last 5 years,” said *Mangeat*, who recently served as counsel in the FIFA case in which a number of officials were requested by the USA. “The practice of Swiss courts shows how difficult it is to secure a refusal of extradition, even when the issue of poor prison condition or inhumane treatment is raised by the suspect or defendant.”

Australian lawyer Prof. *Ned Aughterson* then highlighted the peculiarities of the “unduly complex” Australian procedure of extradition, drawing parallels with bilateral extradition practice in the United States and Canada. “The proceeding is unquestionably administrative,” argued *Aughterson*, “and bail is very rarely granted, pending the extradition proceeding.”

The third International Extradition Conference will be held in Northern Italy at the end of June 2018. All those interested should email the organisation team at stefano.maffei@gmail.com

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have been fulfilled under which the absence of the person at the trial may justify the recognition of the conviction *in absentia* (cf. Art. 4a(1) lit a) to d)). Thus, appeal proceedings may remedy a possible breach of the defendant’s right to

be present during a prior stage of the criminal proceedings, because Art. 4a of the FD cannot be applied cumulatively to all stages of the criminal proceedings. (TW)

► [eucri ID=1703054](https://www.eucri.org/ID=1703054)

CJEU Interprets Refusal Ground of Trials *in absentia* in the Context of Handing Down Cumulative Sentences

On 10 August 2017, the CJEU delivered another judgment on the interpretation of the concept of “trials resulting in the

decision” within the meaning of Art. 4a FD EAW. Compared to its judgment of the same day in case C-270/17, *Tupikas* (see news item above), the CJEU encountered a new variant because of particularities of Polish criminal procedure.

In the case at issue (C-271/17 PPU, *Sławomir Andrzej Zdziasek*), the referring court, the Rechtbank Amsterdam, posed the question as to whether the conditions (under which the recognition of enforcement of a decision in the proceedings at which the defendant was not present can be refused (Art. 4a (1) FD EAW)) also apply to decisions at a later stage of the criminal proceedings, amending one or more previously imposed custodial sentences, such as the determination of a cumulative sentence. This was the case in the present proceedings in the issuing country, where the District Court of Wejherowo, Poland handed down a cumulative sentence against Mr. Zdziasek. It became apparent that the procedure combined custodial sentences against Mr. Zdziasek, which had been imposed by several previous judgments from other courts, and the District Court of Wejherowo no longer examined the question of guilt in its proceeding, since the previous convictions were final. Thus, the decision, which is the subject of the EAW, only modified the quantum of penalties, even leading to a favourable result for the person concerned.

By referring to the case law of the European Court of Human Rights regarding the applicability of defence guarantees in Art. 6 ECHR, the CJEU affirmed that proceedings involving a judgment that hands down a cumulative sentence and leads to a new determination of the level of custodial sentences previously imposed, must be regarded as relevant for the application of Art. 4a(1) FD EAW, where they entail a margin of discretion for the competent authority in the determination of the level of the sentence and finally determine the sentence.

According to the CJEU, the fact that the new sentence is hypothetically more

favourable to the person concerned is irrelevant.

On top of its judgment in the *Tupikas* case, the CJEU further clarified that – for the purposes of the application of Art. 4a(1) – both decisions must be taken into account: (1) the appeal decision finally determining the guilt and imposing a custodial sentence on a person and (2) the subsequent decision amending the level of the initial sentence(s) and finally determining the (cumulative) sentence.

In the end, the CJEU confirmed that the executing authority is entitled to refuse surrender if it finds that the situations referred to in Art. 4a(1) lit. a) to d) are not covered by the information given in the EAW or by additional information from the issuing authorities. However, the CJEU limits this message by adding that “the FD EAW does not prevent the [executing] authority from taking account of all the circumstances characterising the case before it in order to ensure that the rights of the defence of the person concerned are respected during the relevant proceeding or proceedings.”

It will be seen how the latter aspect is implemented in practice. Notwithstanding, the CJEU’s ruling seems to have strengthened the procedural rights of persons concerned by ensuring that their fundamental right to a fair trial is guaranteed. (TW)

► [eucrim ID=1703055](#)

AG Gives Opinion on Refusing EAW in Case of Minors

For the first time, the CJEU has to deal with the interpretation of the ground for mandatory non-execution of an EAW provided for in Art. 3(3) FD EAW. On 6 September 2017, Advocate General (AG) *Bot* delivered his opinion in case C-367/16 (*Dawid Piotrowski*). In the case at issue, which was referred by the Court of Appeal of Brussels, the Belgian authorities are confronted with an EAW from Poland seeking the surrender of Polish citizen Mr. Piotrowski for the purpose of execution of two prison sentences. The offenses were committed in

2014 when Mr. Piotrowski was sixteen years old.

The Court of Appeal of Brussels seeks guidance on how to interpret Art. 3(3) of the FD EAW, which allows the executing state to refuse to execute the EAW if the person concerned may not be held criminally responsible for the acts on which the arrest warrant is based under the law of the execution state. In particular, it wants to know to what extent conditions of Belgian law for determining the criminal prosecution of persons under the age of 18 can also be applied in the EAW procedure.

In its opinion, AG *Bot* first states that Art. 3(3) must be interpreted as meaning that this refusal ground does not apply simply because the person responsible for the offense is a minor.

Furthermore, the AG clarifies that the judicial authorities of the executing Member State cannot apply their specific domestic procedures in order to identify the criminal responsibility of the minor if the acts were committed there. This would not comply with the principle of mutual recognition. In view of the fundamental rights of children (Art. 24(2) CFR) and the principle that education should be preferred over punishment, the executing authorities can examine whether the age of the minor at the time of commission of the offense makes him liable to be subjected to a penalty under the law of the executing Member State.

In the end, the AG leaves the assessment to the referring court. He adds that in case of refusal of surrender, the executing state is required to fulfil its duty of care with respect to the minor. (TW)

► [eucrim ID=1703056](#)

Taking Account of Convictions

First Interpretation of FD on Taking Account of Convictions in the EU Member States by the CJEU

On 21 September 2017, the CJEU delivered a judgment concerning the interpretation of Council Framework

Decision (FD) 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings. It is the first time that the CJEU was called upon to interpret the FD. The reference for a preliminary ruling was made by a Bulgarian court in case C-171/16 (*Trayan Beshkov*). It concerned the scope of the FD, the procedure of recognition of foreign court judgments, and the modalities of recognition.

In the case at issue, Mr. *Beshkov* was convicted by the Regional Court of Klagenfurt, Austria in December 2010 and sentenced to a custodial sentence of 18 months for receiving stolen goods in Austria in the same year. He served six months of imprisonment, and 12 months were suspended with probation. On 29 April 2013, Mr. *Beshkov* was sentenced in Bulgaria to a custodial sentence of one year for acts of assault committed in 2008 in Sofia, Bulgaria.

In 2015, Mr. *Beshkov* applied to the referring court to impose on him, for the purposes of execution, a single overall sentence on the basis of the Bulgarian criminal code. This overall sentence should correspond to the highest of the sentences initially imposed. For the referring court, three problems arose:

- Does the FD on taking account of convictions actually apply to proceedings that only deal with the imposition of an overall sentence in the execution phase and not with the finding of the perpetrator's guilt?
- Is the FD incompatible with Bulgarian criminal procedure law which provides for a special procedure for the recognition and execution of convictions handed down by foreign courts (Art. 463-466 of the Bulgarian Code of Criminal Procedure) and do not foresee that the recognition can be directly initiated by the convicted person?
- Is it contrary to Art. 3(3) of the FD if the Bulgarian rules come to the result that a penalty imposed by a previous conviction (in this case, the conviction

from Klagenfurt) must absorb another penalty or be included in it or be enforced separately?

Regarding the first question, the CJEU replied that it follows from the FD 2008/675 (in particular, the wording of Art. 3(2) and recitals 2 and 7) that it is applicable not only to proceedings concerned with establishing a person's guilt, but also to proceedings relating to the enforcement of the sentence. For the latter, account must be taken of a sentence imposed following a previous conviction, such as the proceedings at issue when determining an overall custodial sentence.

The Court then turns to the second question and concluded that, according to the FD 2008/675, Member States are not allowed to implement a national procedure for prior recognition of convictions by the courts with jurisdiction in the former EU Member State. This also holds true for the possibility of said previous conviction being reviewed (as laid down in Art. 463 to 466 of the Bulgarian Code of Criminal Procedure at issue in the main proceedings). The CJEU refers to the principle of mutual recognition of judgments and judicial decisions in criminal matters, which lies at the very heart of the FD. Making the conviction of another EU Member State a prerequisite in a special recognition procedure would counteract this principle. Instead, previous convictions handed down in another Member State must be taken into account in the terms in which they were handed down.

The latter statement already gives guidance for the reply to the third question. In view of Art. 3(1) and (3) of the FD the CJEU clarifies that legal effects must generally be attached to the previous convictions of another EU Member State. They must be equivalent to those of the latter convictions in accordance with national law. As a consequence, the recognising national court cannot review or alter the arrangements for execution of previous convictions handed down in another Member State. It can

neither revoke a suspension attached to the sentence imposed in such previous conviction nor further execute that sentence. (TW)

► eucrim ID=1703057

Criminal Records

Commission Proposal on Centralised ECRIS System for Third Country Nationals

The Commission proposed a Directive on a more effective exchange of information on previous convictions of third country nationals (TCN) and stateless persons within the European Criminal Records Information System (ECRIS) on 19 January 2016 (see eucrim 1/2016, p. 18). On 29 June 2017, it supplemented this legislative action with a proposal to establish a centralised system for the processing of identity information on such persons. In doing so, the Commission is meeting the demands made by representatives of the Member States in the Council during the examination of the proposal of January 2016. They expressed a strong preference for the establishment of a centralised system for third-country nationals at the EU level, rather than the decentralised system as it currently stands.

The purpose of the centralised system will be to allow a Member State's authorities to identify which other Member States hold criminal records on the third country national concerned, so that they can then use the existing ECRIS system to address requests for conviction information only to these Member States.

The Commission puts forward the following arguments in favour of the centralised system:

- Further horrific terrorist attacks have led to a shift in political opinion towards the systematic use of fingerprints for secure identification, effectiveness, and efficiency and the need to exploit synergies between different European information exchange systems;
- The approach of interoperability of existing European databases and elec-

tronic information exchange systems, which also include the ECRIS-TCN system should be followed. Such interoperability is only possible between centralised systems;

■ Over the course of 2016, it became clear that the decentralised system proposed in January 2016 poses technical problems, notably with respect to decentralised exchanges of pseudonymised fingerprints.

It should be stressed that the proposed Regulation for a centralised ECRIS-TCN applies to processing the identity information of third country nationals, not to conviction information. The latter is regulated in Framework Decision 2009/315/JHA, which itself will be amended by the Directive proposed by the Commission in January 2016. (TW)

►eucrim ID=1703058

JHA Council Holds First Debate on New ECRIS Proposal

At its meeting on 12-13 October 2017, the JHA ministers discussed the proposed Regulation to reform the existing ECRIS into a centralised system (see news item above). The Ministers provided guidance mainly on two issues:

First, the majority agreed that the system should contain information on convicted third country nationals, even if the person also holds an EU nationality.

Second, several ministers felt that, as a minimum, fingerprints should be entered into the system when the person concerned has been convicted to a custodial sentence in relation to an intentionally committed criminal offence.

Work will now continue at the technical level. (TW)

►eucrim ID=1703059

cess to information on the consultations and reasonable deadlines for submitting draft texts. A code of conduct needs to be adopted and implemented in practice. Besides the MPs' declarations, *ad hoc* disclosure needs to be introduced for cases in which a potential conflict between specific private interests of individual MPs emerges in relation to a matter under consideration in parliamentary proceedings. The report further endorses measures ensuring the proper supervision of declaration obligations and the proper sanctioning of failure to honour such obligations.

Regarding judges and prosecutors, Monaco relies on significant outside involvement of French officials. This moderates possible social relations, on the one hand, but also requires transparent and objective recruitment, on the other. In this context, the report calls for:

- Enhancing the role and operational independence of the Judicial Service Commission and spelling out in legislation its disciplinary power and capacity of action;
- Establishing the appointment of members of the Supreme Court in a transparent procedure and based on adequately objective criteria;
- Generally ensuring the transparency of the appointment of judges and prosecutors;
- Ensuring that Court of Cassation hearings are held publicly as much as possible;
- Adopting a code of conduct for judges and prosecutors.

Finally, with regard to prosecutors, GRECO recommends additional guarantees for the operational independence of the Public Prosecutor's Office and the executive branch. It suggests that the prohibition to issue any instruction in individual cases be laid down in legislation.

►eucrim ID=1703060

* If not stated otherwise, the news reported in the following sections cover the period 1 July 2017 – 15 October 2017



Council of Europe*

Reported by Dr. András Csúri

Specific Areas of Crime

Corruption

GRECO: Fourth Round Evaluation Report on Monaco

On 13 July 2017, GRECO published its fourth round evaluation report on Monaco. This latest evaluation round was launched in 2012 in order to assess how states address the prevention of corruption with respect to Members of Parliament (MPs), judges, and prosecutors (for recent reports on specific countries, see

eucrim 3/2014, p. 83; 4/2014, pp. 104-106; 1/2015, p. 11; 2/2015, pp. 43-45; 3/2015, pp. 87-88; 1/2016, pp. 20-22; 2/2016, pp. 82-83; 3/2016, pp. 134-135; 4/2016, pp. 168-169; 1/2017, pp. 22-23; 2/2017, pp. 76-79).

The report acknowledged the progress made in the management of anti-corruption policies and in the gradual strengthening of anti-corruption mechanisms. That said, GRECO also made 16 recommendations to Monaco.

As regards MPs, the report calls for enhancing the transparency of the legislative process, including easy public ac-

GRECO: Fourth Round Evaluation Report on Ukraine

On 8 August 2017, GRECO published its fourth round evaluation report on the Ukraine. GRECO encourages Ukrainian authorities to pursue without delay the anti-corruption reforms launched following the “Revolution of Dignity.” It calls for effective implementation of the reforms and for corresponding results. The report identifies the main challenges as follows: addressing major cases of corruption and overcoming the broad rules of impunity.

As regards the newly established anti-corruption bodies, in particular the National Anti-Corruption Bureau (NABU) and the National Agency for Corruption Prevention (NACP), GRECO made the following recommendations for all categories under review (MPs, judges, and prosecutors):

- Enhancing the independence and impartiality of the NACP, especially by clearly defining its investigative tasks in order to fully secure the transparency and accountability of its actions;
- Ensuring the effective supervision of existing financial declaration requirements, including the adoption of an objective lifestyle monitoring procedure, the introduction of automated cross-checks of data, and the interoperability of databases;
- Ensuring NABU has access to the complete asset declarations received by the NACP as well as to all national and regional databases necessary for the proper scrutiny of asset declarations within the framework of criminal proceedings;
- Developing the rules applicable to the acceptance of gifts, in particular by lowering the threshold of acceptable gifts, extending the definition to any benefits and establishing internal procedures for the valuation and reporting of gifts.

With regard to MPs, the report issued the following recommendations:

- Ensuring that all legislative proposals are processed in the light of adequate transparency and consultation, in par-

ticularly by safeguarding the inclusiveness of parliamentary committee work through the public, consultations, and expert hearings; by providing for adequate timeframes; and by introducing precise rules regarding fast-track legislative procedures;

- Adopting a code of conduct for MPs, coupled with written guidance on its practical implementation as well as its easy accessibility to the public;
- Introducing rules on engaging with lobbyists and third parties seeking to influence the legislative process;
- Strengthening the internal control mechanisms for integrity in Parliament, inter alia by providing for a range of effective sanctions;
- Introducing clear guidelines to ensure that procedures to lift the immunity of MPs do not hamper or prevent criminal proceedings in respect of corruption-related offences.

As regards judges, GRECO called for the following measures to be taken:

- Ensuring that any criminal offence may only criminalize deliberate miscar-

riages of justice and that these offences are not misused by law enforcement agencies to exert undue pressure (and influence) on judges. In this regard, the criminal offence of “delivery of a knowingly unfair sentence, judgment, ruling or order by a judge” should be abolished;

- Reducing the number of bodies involved in the appointment of judges and broadening the appeal possibilities for candidate judges in appointment procedures;
- Defining disciplinary offences relating to the conduct of judges more precisely by referring to clear and specific offences instead of to broad and flexible terms, e.g., the current reference to the “norms of judicial ethics and standards of conduct, which ensure public trust in court.”

Finally, regarding prosecutors the report made recommendations as follows:

- Reviewing the procedures for the appointment and dismissal of the Prosecutor General in order to make this process less prone to undue political influence;
- Ensuring that an absolute majority of

Common abbreviations

AFSJ	Area of Freedom, Security and Justice
CFT	Combating the Financing of Terrorism
CFR	Charter of Fundamental Rights (of the EU)
CJEU	Court of Justice of the European Union
ECB	European Central Bank
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EDPS	European Data Protection Supervisor
EES	Entry-Exit System
(M)EP	(Member of the) European Parliament
EPPD	European Public Prosecutor's Office
FIU	Financial Intelligence Unit
GRECO	Group of States against Corruption
JIT	Joint Investigation Team
LIBE Committee	Committee on Civil Liberties, Justice and Home Affairs of the EP
(A)ML	(Anti-)Money Laundering
MLA	Mutual Legal Assistance
MONEYVAL	Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism
MoU	Memorandum of Understanding
PNR	Passenger Name Record
PIF	Protection of Financial Interests
SIS	Schengen Information System
TFEU	Treaty on the Functioning of the European Union

prosecutorial practitioners are elected by their peers;

- Regulating in more detail the career advancement of prosecutors;
- Complementing the new code of ethics with guidelines accessible to all prosecutors as well as the public;
- Ensuring that any decisions to disqualify a prosecutor are subject to appeal.

Altogether 31 recommendations were addressed to Ukraine, the implementation of which will be assessed by GRECO in 2019 through its compliance procedure.

► [eucrim ID=1703061](#)

Money Laundering

MONEYVAL: Fifth Round Evaluation Report on Slovenia

On 3 August 2017, MONEYVAL presented its Fifth Round Evaluation Report on Slovenia. The fifth evaluation round builds on previous MONEYVAL assessments by strengthening the examination of how effectively Member States prevent and combat ML, terrorist financing (TF), and proliferation (see also eucrim 1/2016, p. 23; 2/2016, pp. 83-84; 4/2016, p. 169; 1/2017, p. 23).

Although Slovenia is no major international financial center, its relatively stable and reliable financial sector may attract money launderers from around the region. MONEYVAL acknowledges that the Slovenian authorities have partially succeeded in identifying ML risks, in particular by carrying out a first national risk assessment in 2015, which was updated in 2016. However, TF risks were only assessed to a limited extent, and the overall understanding of the TF risks varies significantly between different stakeholders. The banks in Slo-

venia have a sound understanding of and adequate measures to tackle sector-specific ML risks, but the degree of risk-awareness varies among non-banking financial institutions and other relevant professions. A recently adopted AML/CFT Action Plan exists, based on the results of the risk assessment; however, it outlines rather general objectives and activities.

Slovenian law enforcement agencies to some extent use financial intelligence gathered by the Slovenian FIU, produce evidence, and trace criminal proceeds based on these information. However, the effectiveness of its use is curtailed by legal and jurisdictional factors.

The report calls for a higher number of ML investigations. Though their number has risen since the last evaluation in 2010, it is still much lower than the number of investigations and convictions for relevant proceeds-generating predicate offences. Slovenia's risk factor also warrants a higher number of ML investigations. Progress has been made in the number of ML convictions, but several obstacles still hinder the prosecution and adjudication of ML cases. They include uncertainties as regards evidentiary requirements, the insufficient expertise of judges and prosecutors in the field as well as transnational ML cases, in which the predicate crime has been committed in a neighboring jurisdiction. That said, the report acknowledges that Slovenia proactively seeks MLA and has achieved corresponding results.

The report recommended the following actions for Slovenia:

- The authorities should ensure a more complete and reliable assessment of ML/TF risks by broadening the types of information used in the assessment process and by ensuring the participation of

all relevant stakeholders;

- The AML/CFT Action Plan should include clear objectives and activities for the competent authorities;

■ The law enforcement authorities should use financial intelligence more proactively in cases where clear indicators on specific predicate offence are missing;

- Slovenia should establish a legal and institutional framework to ensure the effective and systematic management of assets;

■ Though certain measures increasingly serve to enhance the transparency of legal persons, Slovenia should improve its assessment of the vulnerabilities and potential misuse of ML/TF for all types of legal persons, which may be established in the country, ensuring coordinated measures to mitigate the risks of misuse.

The experts also found that Slovenia has undertaken certain measures to increase the transparency of legal persons and prevent their misuse, but that these measures have not proven sufficient to effectively prevent criminals from setting up companies for illicit purposes.

While Slovenian law enforcement and intelligence authorities have a good understanding of the risks of terrorist financing, the report concluded that existing limitations on criminalizing the financing of terrorism hinder the effective investigation and prosecution of this crime.

The report praised Slovenia for having, to a large extent, an effective system of international co-operation to combat money laundering and terrorist financing. This includes high-risk areas, and it has resulted in criminal convictions as well as the confiscation of proceeds of crime.

► [eucrim ID=1703062](#)

File Rouge

The articles in this issue provide a first analysis of the EU's new landmark legislation establishing a European Public Prosecutor's Office (the EPPO) for the protection of European financial interests through the procedure of enhanced cooperation (see also the report in the news section). *P. Csonka/A. Juszcak/E. Sason* give an overview of the main features of Regulation (EU) 2017/1939 at the beginning of the article section; other authors tackle several critical issues that are already sparking discussions about the new EU body. They first scrutinise the EPPO's structure, which has resulted in a radical change from the original Commission proposal and indicates the Member States' reluctance towards the conferral of true investigative powers to a European investigation authority. The two articles by *L. Kuhl* and *A. Met-Domestici*, respectively, address the efficiency of the negotiated collegiate structure, which abandons two main features of the original proposal that greatly reflected the innovative dimension of the EPPO: a lean central structure and the principle of European territoriality. They further critically analyse the strong position of national law(s) as the main legal tool for EPPO operations and point out the possible shortcomings of the "national link." The latter is evident in the status of the European Delegated Prosecutors (EDPs) acting at the national level and enjoying great autonomy in criminal investigations, provided they follow the directions and instructions of the Permanent Chamber in charge of the case and especially those of the European Prosecutor from the same Member State as the EDP.

A second crucial issue is the EPPO's competence where the Regulation moves away from the Commission's proposal providing an exclusive competence in the PIF sector and switches to a shared competence. Ambiguous and vague criteria for the EPPO's jurisdiction risk undermining the main objective of the EPPO to achieve a more efficient protection of the European budget. *F. Giuffrida* illustrates such problems in relation to the scheme of the Regulation on the choice of forum. Furthermore, it should be borne in mind that there are different reasons for the decision of the

participating MS to agree on the enhanced cooperation procedure – more integrationist approaches are mixed with the strategic goal of some participating MS to control the development of the new body "from the inside." This is going to be extremely relevant, *inter alia*, when it comes to a possible extension of the EPPO's competences beyond PIF crimes, as provided for in Art. 86(4) TFEU. Legal problems linked to this extension – recently already advocated by the President of the European Commission Juncker and by French President Macron – are analysed in the articles by *F. Giuffrida* and *C. Di Francesco Maesa*. They focus, in particular, on the controversial issue of whether the unanimity of the Council required by said article is intended to refer only to the participating MS or to all the MS, thus empowering non-participating MS to veto such an extension and impeding an effective implementation of enhanced cooperation.

Notwithstanding these critical aspects, the authors agree that the creation of the EPPO is supposed to play a major role in the ongoing process of the creation of a European Area of Freedom, Security and Justice because of the dynamics that this new body is expected to activate. Indeed, it marks the establishment of the first single investigating office across EU MS – independent and accountable – that is obliged to initiate a criminal investigation if sufficient grounds are given. The recurrent link between corruption, money laundering, and serious VAT carousels concerning the European budget as well as other serious crimes having a cross-border dimension, e.g., organised crime, trafficking offences, and even terrorism, could lead to a progressive awareness of the need to extend the EPPO's mandate in the future. From this perspective, the EPPO could become the key actor in the overall security strategy of the Union, provided that MS ultimately accept and support its full integration into the European judicial landscape.

Prof. Rosaria Sicurella, University of Catania, & Thomas Wahl, Managing Editor

The Establishment of the European Public Prosecutor's Office

The Road from Vision to Reality

Peter Csonka, Adam Juszczyk and Elisa Sason*

I. Introduction

The establishment of a European prosecution office with the competence to fight crimes against the financial interests of the EU has been the subject of discussion for many years¹. Twenty years after the *Corpus Juris* experts recommended setting up a European Public Prosecutor's Office² (EPPO) and four years after the Commission tabled its proposal³, the Regulation establishing the EPPO received the European Parliament's consent on 5 October 2017⁴ and was finally adopted by the Justice and Home Affairs (JHA) Council on 12 October 2017 under enhanced cooperation with 20 Member States⁵. The Regulation was published in the Official Journal on 31 October 2017⁶ and entered into force on 20 November 2017. The EPPO will be an independent European prosecution office competent for investigating and prosecuting the crimes defined in the recently adopted Directive on the fight against fraud to the Union's financial interests by means of criminal law (the "PIF Directive")⁷.

Truth be told, reaching an agreement on the EPPO has not been easy. Shortly after the adoption of the Commission proposal⁸ in July 2013, 14 chambers of national Parliaments in 11 Member States⁹, issued reasoned opinions pursuant to Protocol No 2 on the application of the principles of subsidiarity and proportionality, requesting the Commission to review its proposal. It was only the second time that the threshold of at least one third of the votes allocated to the national Parliaments¹⁰ was reached and the mechanism triggered¹¹. After careful review of the reasoned opinions, the Commission concluded that the proposal for the EPPO Regulation complied with the principle of subsidiarity and decided to maintain the proposal¹² while committing to take due account of the reasoned opinions received.

It took another four years of intense, complex and at times difficult negotiations until the Regulation could be adopted¹³. The Regulation was adopted on the basis of Art. 86 of the Treaty on the Functioning of the European Union (TFEU), which foresees a special legislative procedure and requires unanimity in the Council after obtaining the consent by the Parliament¹⁴, yet

also provides for the possibility for enhanced cooperation, in case unanimity cannot be reached. The legislator had to make use of this possibility¹⁵, for Hungary, Malta, the Netherlands, Poland, and Sweden decided not to join the EPPO at this stage. In the case of Denmark, Ireland and the UK Protocols No 21 and No 22, respectively, apply, meaning that the Regulation is either not applicable or that these Member States could decide not to opt in.

Compared to the Commission proposal, the text of the Regulation changed greatly in the course of the negotiations and, in particular the structure and competences of the EPPO have undergone significant changes. This article sets out the main elements of the Regulation, outlines the expected advantages of the EPPO, illustrates the next steps to be taken in the establishment of the Office and gives an outlook on its future activities. Other important aspects of the Regulation, such as the detailed provisions on appointment and dismissal of the European Chief Prosecutor, the Deputies, European Prosecutors, and the European Delegated Prosecutors, the comprehensive set of rules on data protection, the budgetary and staffing provisions, will not be discussed in detail in this article.

II. The Main Elements of the Regulation

This section presents the key aspects of the EPPO which will ensure its effective functioning as a single Office throughout all the participating Member States. In the following the EPPO's general principles (1.) will be discussed along with its structure (2.), competence (3.), the investigations and prosecutions (4.), the procedural rights of the suspects in EPPO investigations (5.), judicial control (6.) and the Office's relations with partners (7.–9.).

1. General principles of the EPPO

The EPPO will not only be a new actor in the Union's judicial landscape, it will also adopt an entirely novel approach in

fighting crimes at EU level. Whereas the EU Anti-Fraud Office (OLAF) has the powers to conduct administrative investigations¹⁶ and the EU's Judicial Cooperation Unit (Eurojust) fulfils the task of facilitating the coordination of the investigations and prosecutions carried out by the competent authorities in the Member States¹⁷, the EPPO is the first Union body that will carry out its own criminal investigations and prosecutions concerning criminal offences against the Union's financial interests (Art. 4).

Art. 5 sets out the basic principles which underpin the tasks of the EPPO. Art. 5(1) and (2) state that the EPPO will be bound by the Charter of Fundamental Rights of the European Union (CFR) and the principles of rule of law and proportionality in all its activities – this will be the foundation upon which the EPPO is going to operate as a Union body, including all of its acts of procedure. The basis for the investigations and prosecutions of the EPPO will obviously be the Regulation. Art. 5(3), however, clarifies that, for want of – in particular – a harmonised EU criminal procedure code, national law shall also apply to the extent that a matter is not regulated by the Regulation, with the latter prevailing, should a matter be governed by both. In addition, the Office is obliged to conduct its investigations in an impartial manner and seek all relevant evidence – both, inculpatory or exculpatory (Art. 5(4)). This makes the EPPO somewhat similar to an investigating judge, whose impartiality is a corollary requirement to independence.

Art. 5(5) provides for an important principle: the EPPO will have to open and conduct investigations without undue delay. This means that the EPPO is, in principle, obliged to initiate a criminal investigation where there are sufficient grounds (Art. 26) and there is no discretion to initiate investigations dependent on e.g. policy considerations, the annual management plan, or the availability of resources, such as in OLAF's case¹⁸. This is a distinct difference between the EPPO and OLAF which at the same time highlights the different nature of the mandates of these two EU bodies.

Art. 5(6) is an emanation of Art. 4(3) TEU and underlines that the relationship between the EPPO and the national authorities will be governed by the principle of sincere cooperation, meaning that the competent national authorities actively assist and support the investigations and prosecutions of the EPPO. In practice this means that the EPPO and the national authorities shall support and inform each other with respect to relevant cases affecting the EU budget. Of particular importance in this context is the obligation for competent national authorities to report without undue delay any criminal conduct in respect of which the EPPO could exercise its competence (Art. 24). Similarly, EU institutions, bodies, offices and agencies need to report in the same way to the EPPO (Art. 24).

Art. 6 governs another fundamental principle of the EPPO: independence and accountability. The EPPO will be an independent European prosecution office and can neither seek nor take instructions from any person external to the Office, any Member State or EU institutions, bodies, offices or agencies – the latter shall also refrain from seeking to influence the EPPO in the exercising of its tasks. It should be stressed that the independence of the European Chief Prosecutor will also be guaranteed by the selection and appointment procedure. The European Chief Prosecutor will be selected based on an open call for candidates and appointed by the European Parliament and the Council for a non-renewable term of seven years. In addition, the selection of the other key EPPO staff also follows a number of rules safeguarding their independence (Artt. 16 and 17). With regard to the European Delegated Prosecutors, they will enjoy a functionally and legally independent status, which is different from any status under national law (Art. 13(1) and recital 32).

Art. 6(2) states that the EPPO will be accountable to the European Parliament, the Council and the Commission for its general activities. Pursuant to Artt. 6(2) and 7, the EPPO will issue annual reports on its general activities to the European Parliament and to the national parliaments, as well as to the Council and the Commission. Moreover, the European Chief Prosecutor will appear once a year before the European Parliament and the Council to give account of the EPPO's general activities. The European Chief Prosecutor will also appear before national parliaments at their request (Artt. 6 and 7).

2. Structure

Whereas the Commission proposal provided for a central structure with one European Public Prosecutor assisted by four Deputies¹⁹, the Regulation adopted by the Council opts for a collegiate structure at central level. This fundamental change, although much debated and criticised, was considered necessary by most governments to politically support the EPPO's establishment. As a result the central office of the EPPO, which will have its seat in Luxembourg (Art. 106), will consist of the European Chief Prosecutor²⁰ and 20 European Prosecutors²¹, one from each participating Member State, who together will form the EPPO College²², and will also include support staff. For administrative and budgetary purposes, the EPPO will be managed by an Administrative Director²³.

The Regulation, however, has maintained the decentralised structure of the EPPO: besides a central office there will also be European Delegated Prosecutors²⁴ at decentralised, i.e. Member State, level, as foreseen in the Commission proposal. This will allow the EPPO to be at the proximity of the crimes

committed and to work hand in hand with the national law enforcement authorities, in particular police, customs and financial authorities, when carrying out investigations and prosecutions.

Unlike the College of Eurojust, which has substantive operational powers²⁵, the EPPO College will only be responsible for the general oversight of the EPPO and cannot take any operational decisions in individual cases²⁶. The EPPO College shall nonetheless take decisions on strategic matters and on general issues arising from individual cases, so as to ensure coherence, efficiency and consistency, as well as on other matters specified in the Regulation. The latter include important decisions, such as the establishment of the Permanent Chambers (Art. 9(3)), the adoption of the Internal Rules of Procedure (Art. 9(4)), the appointment of the European Delegated Prosecutors (Art. 17(1)), or the approval of the budget of the EPPO (Art. 90(1))²⁷.

As regards the investigatory and prosecutorial work of the EPPO, the Regulation has found a balanced approach in safeguarding the necessary knowledge about the legal system and the language skills relevant in an individual case on the one hand and preserving the European character of the EPPO investigations on the other. The responsibility for investigations, prosecutions and bringing cases to judgment lies with the European Delegated Prosecutors²⁸, as foreseen in Art. 13²⁹. Thereby, as a rule, a case shall be initiated and handled by the European Delegated Prosecutor who is from the Member State where the focus of the criminal activity lies or in which the bulk of the offences has been committed³⁰.

Although the European Delegated Prosecutors will enjoy a wide range of autonomy, they shall follow the directions and instructions of the Permanent Chamber in charge of a case, as well as the instructions from the supervising European Prosecutor who is from the same Member State as the European Delegated Prosecutor (Artt. 13(1), 12, and 10). In particular the latter point, the supervision of the investigation and prosecution by a European Prosecutor at central level, who is from the same Member State as the European Delegated Prosecutor handling the case (Art. 12(1)) was, together with the question of the EPPO's competence, the most controversial topic in the negotiations.

The benefits of this link seem obvious. European Prosecutors, who are experienced in the legal system where the case is being investigated, prosecuted and tried, are handling the case without facing any language barriers. To balance this way of handling cases and to make sure that no bottlenecks arise if the supervisory role is entrusted to one European Prosecutor only, the Regulation foresees that it is the Permanent Chambers

that monitor and direct the investigations and prosecutions (Art. 10(2)). Art. 12(1) accordingly clarifies that the European Prosecutors supervise the investigations and prosecutions conducted by the European Delegated Prosecutors on behalf of the Permanent Chambers and in compliance with any instructions the Permanent Chambers have given in accordance with Art. 10(3–5).

The Permanent Chambers will, thus, play a crucial role in the investigations and prosecutions. Composed of the European Chief Prosecutor (or one of the Deputies) and two European Prosecutors, the Permanent Chambers will possess wide-ranging decision-making powers during the investigations and prosecutions. These include bringing a case to judgment, dismissing a case, applying a simplified procedure, referring a case to the national authorities or reopening investigations (Art. 10(3)). The Permanent Chambers may also instruct the European Delegated Prosecutors to initiate an investigation or exercise the right of evocation as well as take various decisions in the management of the individual cases (Art. 10(4)).

Although the supervising European Prosecutor does not necessarily need to be a permanent member of the Permanent Chamber responsible for the case, he will be the central link between the Permanent Chamber and the handling European Delegated Prosecutor, functioning as a liaison and information channel, giving the Chamber's instructions to the European Delegated Prosecutors and monitoring their implementation (cf. Artt. 10(5), 12(3) and 12(5)). Moreover, pursuant to Art. 10(9), the supervising European Prosecutor shall in any case participate in the deliberations of the Permanent Chamber and have a voting right as regards certain decisions³¹. Other European Prosecutors and European Delegated Prosecutors involved in the case may be invited to attend the deliberations, but shall have no voting rights. Decisions by the Permanent Chambers are taken by simple majority, with the chair having a casting vote (Art. 10(6)), including the possibility to take decisions by means of a written procedure (Art. 10(8)).

To allow for more flexibility, in certain cases, depending on the degree of seriousness of the offence or the complexity of the proceedings in the individual case and involving a damage of less than € 100,000, the Permanent Chambers can delegate some of their decision-making powers to the European Prosecutor supervising the case (Art. 10(7)). Similarly, a too rigid link has been avoided in the Regulation by allowing for the possibility to assign the supervision of investigations and prosecutions to a European Prosecutor, who is not from the same Member State as the European Delegated Prosecutor.³²

In addition to his operational role as a member of the Permanent Chambers, the European Chief Prosecutor will direct the activities of the EPPO and represent it externally, and will, e.g., appear before the European Parliament and the national Parliaments (Art. 7). The European Chief Prosecutor will also take various decisions, e.g., on the deviation from this link in Art. 12(2), he will approve the number of European Delegated Prosecutors as well as the functional and territorial division of competences among them in line with Art. 13(2), decide on the prolongation of the time limit to exercise the right of evocation pursuant to Art. 27(1), make a request for the lifting of privileges or immunities pursuant to Art. 29, or prepare the decisions on the establishment of the budget pursuant to Art. 90(1).

3. Competence

By contrast to the Commission proposal, according to which the EPPO had exclusive competence for criminal offences affecting the Union's budget (PIF offences), the Regulation foresees that the EPPO has shared competence over these crimes (cf. recital 30). Pursuant to Art. 22 the EPPO will be competent in respect of criminal offences affecting the financial interests of the Union as provided in the recently adopted PIF Directive. Moreover, Art. 22(2) states that the EPPO will also be competent for offences relating to the participation in a criminal organisation as defined in Framework Decision 2008/841/JHA, if the focus of the criminal activity of such a criminal organisation lies on the commission of PIF offences. The EPPO's material scope of competence will also be extended to any other criminal offence that is inextricably linked to a PIF offence (Art. 22(3)).

The Regulation, however, sets limits to the EPPO exercising its material competence. Art. 22(1) sentence 2 already stipulates that criminal offences as defined in point (d) of Art. 3(2) of the PIF Directive, i.e. the important VAT fraud cases, fall within the EPPO's material scope of competence only if they are connected with the territory of two or more Member States and involve a total damage of € 10 million.

Art. 25(1) further sets out the notion of shared competence between the EPPO and the national authorities stating that the EPPO exercises its competence by either initiating an investigation under Art. 26 or by deciding to use its right of evocation under Art. 27, and that in such event, the national authorities will not exercise their own competences in respect of the same criminal conduct. Following paragraph 2 of Art. 25, the EPPO may, accordingly, only exercise its material competence if the criminal offence involves a damage to the financial interests of the Union of € 10,000 or more, unless the case has "repercussions"³³ at Union level or involves EU officials.

In the same vein, Art. 25(3) – a provision that is as crucial as it is complex – stipulates that the EPPO refrains from exercising its competence over PIF offences, which are inextricably linked to other offences, under certain conditions connected to two non-cumulative distinct criteria: sanctions and the damage caused. Thus, if the maximum sanction provided for by national law for the PIF offence is equal or less severe than the maximum sanction for the linked offence, then the EPPO shall not exercise its competence – unless the linked offence has been "instrumental"³⁴ to commit the PIF offence.

Secondly, if the damage caused or likely to be caused to the Union's financial interests does not exceed the damage caused or likely to be caused to another victim (e.g. a Member State in a co-funded case), then, in the same way, the EPPO will not exercise its competence. This damage criterion does, however, not apply to the offences referred to in Art. 3(a), (b), and (d) of the PIF Directive, i.e. in particular not to VAT fraud cases. Another exception to the rule on the damage criterion can be found in Art. 25(4), which, by way of a voluntary transfer of cases, allows the EPPO to exercise its competence even if the damage to the Union is lower than the damage to another victim, provided the competent national authorities give their consent and the EPPO appears to be better placed³⁵ to investigate or prosecute.

In order for the EPPO to establish whether it is competent and hence can initiate investigations or make use of its right of evocation, Art. 24 provides for comprehensive reporting obligations imposed upon the national authorities and the EU institutions, bodies, offices and agencies.

Sound communication and cooperation between the EPPO and the national authorities will be fundamental in order to ensure a smooth division of labour. The circumstance that the EPPO will have an integrated, decentralised structure with European Delegated Prosecutors across the participating Member States is in this respect a decisive advantage. Nonetheless, in the event of disagreement between the EPPO and the national authorities over the question of material competence, Art. 25(6) foresees that the national authorities, who usually decide cases of disagreement over the competences of prosecution offices at national level, shall decide whether the EPPO or the national authorities is competent. The Court of Justice of the European Union (CJEU) may, pursuant to Art. 42(2)(c), review how the important provision on conflicts of competences will be applied.

As regards the EPPO's personal and territorial competence, recital 64 sets the guiding idea by stating that the EPPO should exercise its competence as broadly as possible so that its investigations and prosecutions may extend to offences commit-

ted outside the territory of the participating Member States. Accordingly, Art. 23 mentions the principle of territoriality and the (active) personality principle, but recital 64 makes it clear that this needs to be understood in a broad manner, i.e. it is not excluded that the EPPO investigates and prosecutes cases even if they were committed outside the territory of the participating Member States, i.e. in the territory of non-participating Member States or Third States, if a genuine link can be established to the financial interests of the Union.

4. Investigations and prosecutions

How will the EPPO conduct its investigations and prosecutions? In accordance with Art. 28(1), the European Delegated Prosecutor handling the case may either undertake investigation measures himself or instruct the competent national authorities to do so. An EPPO investigation will be based on the procedures provided both in the Regulation and, where applicable, national law. For the execution of investigation measures, the EPPO will rely to a large extent on the national authorities, including police, tax and custom authorities. These authorities have the obligation to actively support the EPPO throughout all its activities, that is from the moment a suspected offence is reported until the moment the EPPO decides to prosecute or otherwise dispose of the case.³⁶ Unless urgent measures are required during the investigation (Art. 28(2) and recital 58), the national authorities have to directly follow instructions given by the European Delegated Prosecutor. Under certain conditions, the Regulation allows for the reallocation of a case to another European Delegated Prosecutor³⁷ and, in exceptional cases, even to the supervising European Prosecutor³⁸.

In order to gather inculpatory as well as exculpatory evidence, the EPPO will be able to use a comprehensive set of investigation measures. The EPPO will have six investigation measures at its disposal common to all participating Member States, i.e.: (a) to search any premises, (b) to obtain production of any relevant object or document, (c) to obtain production of stored computer data, (d) to freeze instrumentalities or proceeds of crimes, (e) to intercept electronic communications and (f) to track and trace an object by technical means (Art. 30(1)). These measures are available with regard to offences falling within the EPPO's mandate, where they are punishable by a maximum penalty of at least four years of imprisonment and may be subject to conditions in accordance with national law (Art. 30(1–3) and recital 70). Member States may in particular limit the application of measures (e) and (f) to specific serious offences. In such event, the Member State shall notify the EPPO of the relevant list of such specific serious offences (Art. 30(3) and Art. 117). In addition to the above-mentioned investigation measures, the European Delegated Prosecutors

will also be entitled to order any other measure available under national law in similar national cases (Art. 30(4) and recital 71).

As regards cross-border cooperation between European Delegated Prosecutors, the EPPO introduces a novel approach deviating from standard mutual legal assistance instruments. The European Delegated Prosecutors will operate on the basis of a *sui generis* regime for cross-border cooperation, which foresees an obligation for the European Delegated Prosecutors to execute investigation measures assigned to them (Art. 31(1)). In this context, the Regulation differentiates between the ‘‘handling European Delegated Prosecutor’’, who is responsible for the investigations and prosecutions which he has initiated, and the ‘‘assisting European Delegated Prosecutor’’, who is located in the Member State where an investigation or other measure assigned to him should be carried out.

As a general rule, the judicial authorisation and adoption of an investigation measure assigned by the handling European Delegated Prosecutor to the assisting European Delegated Prosecutor, shall be governed by the national law of the Member State of the handling European Delegated Prosecutor (Art. 31(2)). However, if the law of the Member State of the assisting European Delegated Prosecutor requires a judicial authorisation, the assisting European Delegated Prosecutor needs to obtain such authorisation in accordance with his national law. If the authorisation for this measure is refused, the handling European Delegated Prosecutor is bound to withdraw the assignment (Art. 31(3) subpara 2 and recital 72)³⁹. Vice versa, in the situation where the law of the Member State of the assisting European Delegated Prosecutor would not require a judicial authorisation, but the law of the Member State of the handling European Delegated Prosecutor does, the Regulation stipulates that the authorisation shall be obtained by the latter European Delegated Prosecutor, in line with the main rule (Art. 31(3) subpara 3). In this way, the Regulation avoids the requirement of having a double judicial authorisation for an investigation measure to be carried out in cross-border setting.

Furthermore, the Regulation has a built-in consultation mechanism to deal with situations, in which the assisting European Delegated Prosecutor considers that (a) an assignment is incomplete or contains a manifest relevant error, (b) the assignment cannot be undertaken within the set time-limit, (c) an alternative but less intrusive measure would achieve the same result or (d) the assigned measure does not exist or would not be available in a similar case under the law of his Member State (Art. 31(5)). As a first step, the assisting European Delegated Prosecutor should inform the supervising European Prosecutor and consult with the handling European Delegated Prosecutor to resolve the issue bilaterally, i.e. amongst the

handling and the assisting European Delegated Prosecutor. In the situation described under (d), the European Delegated Prosecutors may, in agreement with the supervising European Prosecutor, have recourse to legal instruments on mutual recognition or cross-border cooperation⁴⁰. Should it prove impossible to resolve this issue between the handling and respectively the assisting European Delegated Prosecutor within seven working days, the matter is to be referred to the Permanent Chamber, which is required to make a final decision in this regard (Art. 31(7-8)).

Following the assignment of an investigation measure, the assisting European Delegated Prosecutor should ensure the enforcement of this measure in accordance with the Regulation and the law of his Member State⁴¹. The Regulation moreover ensures that the handling European Delegated Prosecutor can order the arrest or pre-trial detention of a suspect or accused person (Art. 34(1)) and is entitled to issue or request European Arrest Warrants within the area of competence of the EPPO⁴².

During an investigation conducted by the EPPO, it could become evident that the facts subject to the investigation do not constitute a criminal offence falling within the EPPO's competence or that the conditions of Art. 25(2) and (3) are no longer met. In this situation, the Permanent Chamber should refer the case to the competent national authorities for further follow-up (Art. 34(1-2)). The Regulation also provides for the possibility for the Permanent Chambers to refer a case to the competent national authorities if the damage caused to the financial interests of the Union is less than € 100,000 on the basis of the general guidelines to be issued by the College⁴³. If, for any reason, the national authorities do not accept to take over the case within a timeframe of maximum 30 days, the EPPO shall remain competent to prosecute or dismiss the case (Art. 34(5)).

An EPPO investigation could be closed in various ways; by way of prosecution (Art. 36), dismissal (Art. 39) or by applying a simplified prosecution procedure (Art. 40). In all these situations, the handling European Delegated Prosecutor shall submit a report to the supervising European Prosecutor, including a summary of the case and a draft decision, and subsequently the competent Permanent Chamber should take a decision on the case (Art. 35(1)). It should be noted, however, that the Permanent Chamber cannot decide to dismiss a case if the handling European Delegated Prosecutor proposes to bring a case to judgment (Art. 36(1)). Under certain conditions the Permanent Chamber can also decide to bring a case to judgment in a Member State different from the Member State of the handling European Delegated Prosecutor (Art. 36(3)) or to join several cases (Art. 36(4)). The procedure for lodging an appeal is also covered by the Regulation (Art. 36(7)).

Where prosecution has become impossible pursuant to the national law of the handling European Delegated Prosecutor, the Permanent Chamber should decide to dismiss the case on the basis of an exhaustive list of grounds laid down in the Regulation⁴⁴. In certain cases the EPPO can only dismiss a case after having consulted with the competent national authorities (Art. 39(3)). Following the dismissal of the case, it is up to the EPPO to officially notify the competent national authorities and inform the relevant EU institutions, bodies, offices and agencies, as well as the suspects and accused persons and the crime victims of such dismissal (Art. 39(4)). The EPPO may also refer dismissed cases to OLAF (cf. Art. 101(4)) or to the competent national administrative or judicial authorities for recovery or other administrative follow-up (Art. 39(4)).

Another way of finally disposing of a case concerns the simplified prosecution procedure, i.e. if the applicable national law indeed provides for such a procedure. Such procedure is to be applied in accordance with the conditions provided for in national law (Art. 40(1)).

Throughout the investigations and prosecutions carried out by the EPPO, the principle of free admissibility of evidence applies as an overarching element (Art. 37). Evidence presented by EPPO prosecutors against the defendant to a national court cannot be denied admission on the ground that it was collected in another Member State. However, the trial court is allowed to examine the admissibility of evidence so as to ensure that admission is not incompatible with Member States' obligations to respect the fairness of the procedure, the rights of defence, or other rights of the defendants, as enshrined in the CFR, in accordance with Art. 6 TEU (recital 80).

5. Procedural safeguards

Art. 41 stipulates that the EPPO's investigations and prosecutions should be carried out in full compliance with the fundamental rights of the suspects and accused persons in EPPO proceedings.

Accordingly and as a starting point, suspects and accused persons can rely, at a minimum, on the existing or new EU *acquis*. This includes Directives concerning the rights of suspects and accused persons in criminal investigations ranging from the right to interpretation and translation in criminal proceedings⁴⁵ over the right to information and access to the case file⁴⁶, the right of access to a lawyer⁴⁷, the right to remain silent and the right to be presumed innocent⁴⁸ to the right to legal aid⁴⁹.

In addition, suspects and accused persons as well as other persons involved in EPPO proceedings, may seek recourse

to all procedural rights available under the national law. The Regulation particularly mentions the possibility to present evidence, appoint experts, hear witnesses, or request the EPPO to obtain such measures on behalf of the defence. The latter part constitutes a *sui generis* right for the defence, stemming directly from the Regulation, in the event that these measures are unavailable under national law.

6. Judicial control

The EPPO will base its activities on the rights enshrined in the CFR and on the principles of rule of law and proportionality. The Regulation accordingly foresees a set of rules providing for a comprehensive judicial review of the EPPO's procedural acts. But in the absence of a European Criminal Court, it begs the question, which court should be entrusted with reviewing the procedural acts of the EPPO as a Union body (Art. 3(1)).

According to Art. 19 TEU and in line with the jurisdiction of the CJEU it would follow that the Court of Justice should in principle be competent to assess the legality of Union acts – and this includes acts by the EPPO as a Union body⁵⁰. Art. 86(2) TFEU, however, clarifies that the EPPO exercises the functions of the prosecutor before the competent courts of the Member States, and thus, embeds the EPPO in the Member States' national legal systems.

Moreover, Art. 86(3) TFEU clarifies that the Regulation governs not only general rules applicable to the EPPO but also specific rules, in particular rules applicable to the judicial review of procedural measures taken by the EPPO in the performance of its functions. Indeed the EPPO will apply both, the Regulation and national law and procedure, and as regards the latter, the CJEU in principle lacks jurisdiction⁵¹.

Art. 42(1) accordingly foresees that the judicial review of procedural acts of the EPPO (as well as the failure to act) that have legal effects vis-à-vis third parties is entrusted to the competent national courts in accordance with the requirements and procedures laid down by national law. The CJEU will also play an important role, not only by way of preliminary rulings pursuant to Art. 267 TFEU in questions such as the choice of jurisdiction or conflicts over competences (Art. 42(2)), but also on the basis of Art. 263(4) TFEU insofar as it concerns the dismissal of a case based directly on Union law (Art. 42(3)). Besides, the CJEU retains jurisdiction concerning issues such as compensation for damage, arbitration clauses, staff-related matters, dismissal of the European Chief Prosecutor and the European Prosecutors, and in relation to data protection (Art. 42(4–8)).

7. The EPPO's relations with OLAF and Eurojust

The EPPO's future relations with other EU institutions, bodies, offices and agencies are of significant importance for its functioning. It must be ensured that there is no duplication in mandates and that the law is clear on who is doing what. This particularly applies to OLAF and Eurojust, although the mandates of the EPPO, OLAF and Eurojust differ significantly, both, in terms of scope and nature. The Regulation foresees that the EPPO is able to work efficiently with other EU actors, such as Eurojust (Art. 100), OLAF (Art. 101), Europol (Art. 102) as well as other institutions, bodies and agencies of the Union (Art. 103).

On that basis, for clarity reasons, it is desirable to align the legal instruments of OLAF and Eurojust so as to reflect their future relationship with the EPPO. The draft Eurojust Regulation, on which negotiations are expected to be finalised this year, should adequately reflect the relationship between the EPPO and Eurojust. Similarly, the future relationship between OLAF and the EPPO needs to be properly reflected in the OLAF Regulation, which is currently under revision⁵². However, the EPPO Regulation sufficiently governs the relationship amongst these EU bodies.

As regards the EPPO's relations with OLAF, Art. 101 lays down the key aspects for the cooperation between the two bodies. The EPPO will establish and maintain a close relationship with OLAF based on mutual cooperation within their respective mandates. Their relation should in particular aim at ensuring that all available means are used to protect the Union's financial interests through the complementarity and support by OLAF to the EPPO. To avoid any duplication of work, the Regulation further provides that where the EPPO conducts a criminal investigation, OLAF cannot open any parallel administrative investigation into the same facts.

8. Relations with non-participating Member States

Since not all Member States wish to join the EPPO, the Regulation provides in Art. 105 that the EPPO may conclude working arrangements with non-participating Member States concerning the exchange of strategic information and the secondment of liaison officers to the EPPO. In addition, the EPPO may designate, in agreement with the competent national authorities, contact points in the non-participating Member States in order to facilitate cooperation in line with the EPPO's needs.

A controversial point in the negotiations concerned paragraph 3 of Art. 105 which stipulates that in the absence of a legal instrument relating to the cooperation in criminal mat-

ters and the surrender procedures between the EPPO and the competent authorities of non-participating Member States, the participating Member States notify the EPPO as a competent authority for the purpose of implementation of the applicable Union acts on judicial cooperation in criminal matters in respect of cases falling within the competence of the EPPO.

Reverting to the Union *acquis* on judicial cooperation, i.e. the various mutual recognition instruments such as the European Arrest Warrant, may be a viable way for effective cooperation between the EPPO and non-participating Member States, in line with the principle of sincere cooperation (Art. 4 TEU).

9. Relations with third countries

As regards third countries, the Regulation provides, as mentioned above, that the EPPO should exercise its competence as broadly as possible so that, under certain circumstances, its investigations and prosecutions may extend to offences committed outside the territory of the Member States. This means that the EPPO could investigate a case of fraud concerning EU funds in a third country, if the suspect is an EU official, an EU citizen, or if there is any other genuine link which can be established.

Pursuant to Art. 104, the EPPO will have various cascading ways to work with the authorities of third countries. Firstly, the EPPO may conclude working arrangements with the authorities of third countries in order to facilitate the cooperation, the exchange of information and the secondment of liaison officers to the EPPO. Secondly, international agreements concluded by the EU or to which the EU has acceded in areas that fall under the competence of the EPPO, shall be binding on the EPPO in relation to third countries. In the absence of such multilateral agreements, an EU Member State shall – if permitted under the relevant multilateral international agreement and subject to the acceptance of the third country – recognise and notify the EPPO as a competent authority. As a fallback option, the European Delegated Prosecutors, who are “double hatted”, i.e. continue their functions as national prosecutors at the same time, may seek recourse to their powers as a national prosecutor and request legal assistance in criminal matters from the authorities of third countries. This may happen on the basis of international agreements concluded by that Member State or based on the applicable national law. Finally, the EPPO can request legal assistance in criminal matters from third countries in a particular case on an *ad hoc* basis.

III. Outlook

Art. 120 foresees that the EPPO assumes its investigative and prosecutorial tasks on a date to be determined by a decision

of the Commission on a proposal of the European Chief Prosecutor once the EPPO is set up. As this date cannot be earlier than three years after the entry into force of the Regulation, the EPPO cannot take up its functions before the end of 2020. This timeframe allows Member States to adapt their national systems to the EPPO and to insert the EPPO into the existing judicial landscape and to transpose the PIF Directive into their national law.

During the build-up phase of the EPPO⁵³, a number of important steps shall be taken. This includes the selection and appointment of EPPO senior staff, such as the European Chief Prosecutor, the European Prosecutors, the European Delegated Prosecutors, and the Administrative Director. Furthermore, this phase comprises the drafting and adoption of the Internal Rules of Procedure, as well as the development of a tailor-made EPPO Case Management System. This is a prerequisite for the EPPO to be able to take up its functions from day one. The build-up phase will be accompanied by training activities, not only of incoming EPPO staff but also of practitioners in the Member States, such as judges, police and other law enforcement agencies.

Given the need and the high expectations for the EPPO to take up its functions without delay, it is essential that the stakeholders at EU and Member States level make all necessary efforts to achieve this goal.

IV. Conclusions

Being one of the Commission's key priorities in the area of criminal justice and part of the comprehensive strategy to combat crimes affecting the financial interests of the Union, the EPPO will be the first EU body empowered to carry out criminal investigations and prosecutions into crimes affecting the Union budget, including fraud, corruption, money laundering and serious VAT carousels. Given the vast amount of EU funds lost due to these crimes, it cannot be early enough to have the EPPO in place.

The EPPO will bring more consistency and coherence into the fight against crimes affecting the EU budget, thereby leading to a greater number of prosecutions and convictions, and as a result thereof to a higher level of recovery of fraudulently lost Union funds.

As a new EU body, the EPPO will without doubt face challenges and need to find its place in the existing judicial landscape of the EU. The EPPO will be the key actor in the fight against crimes affecting the Union budget. But corruption, money laundering or serious VAT carousels are often linked

to other serious crimes with a cross-border dimension, such as organised crime, trafficking offences and even terrorism. These crimes pose serious threats to the security of the EU and its citizens and therefore Art. 86(4) TFEU allows for the extension of the EPPO's competences beyond PIF crimes.

In this perspective, the EPPO, one day, could become a cornerstone in the overall security strategy of the Union in the future.

* The views set out in this article are those of the authors and do not necessarily reflect the official opinion of the European Commission.

1 For the historical background on the EPPO cf. Katalin Ligeti and Michele Simonato, "The European Public Prosecutor's Office: Towards a truly European Prosecution Service?", *New Journal of European Criminal Law*, (2013) 4, Issue 1–2. Cf. also F. Zeder, "Der Vorschlag zur Errichtung einer Europäischen Staatsanwaltschaft: Große – kleine – keine Lösung?", *Österreichisches Anwaltsblatt* 2014, p. 212–220 with further references. Already in 1976 the European Commission submitted to the Council a draft text amending the Treaties establishing the European Communities so as to permit the adoption of common rules on the protection under criminal law of the financial interests of the Communities and the prosecution of infringements of the provisions of those Treaties, cf. *O.J. C 222*, 22.9.1976, p. 2–17.

2 M. Delmas-Marty and J.A.E. Vervaele (eds.), *The implementation of the Corpus Juris in the Member States*, volumes 1–4, Intersentia, 2000; see also U. Sieber, Euro-fraud: Organised Fraud Against the Financial Interests of the European Union, in: *Crime, Law and Social Change*, (1998) 30, p. 1 et seq.

3 COM (2013) 534 of 17 July 2013.

4 P8_TA-PROV(2017)0384 – European Parliament legislative resolution of 5 October 2017 on the draft Council regulation implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ("the EPPO") (09941/2017 – C8-0229/2017 – 2013/0255(APP)).

5 Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office. The Member States participating in the enhanced cooperation are: Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Portugal, Romania, Slovakia, Slovenia, and Spain.

6 *O.J. L 283*, 31.10.2017, 1.

7 Directive 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law (PIF Directive). Cf. on the PIF Directive A. Juszczak and E. Sason, (2017) *eu crim*, 80.

8 COM(2013) 534 of 17 July 2013.

9 Cyprus (Vouli ton Antiprosonon), the Czech Republic (Senát), France (Sénat), Ireland (Dáil and Seanad), Hungary (Országgyűlés), Malta (Kamra Tad-Deputati), Netherlands (Eerste Kamer and Tweede Kamer), Romania (Camera Deputaţilor), Slovenia (Državni Zbor), Sweden (Riksdag) and the UK (House of Commons and House of Lords).

10 Cf. Art. 7 of Protocol No 2.

11 The first time the threshold was reached in May 2012 concerning the proposed Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM(2012) 130 dated 21 March 2012. The Commission reviewed its proposal but did not find it in breach of the principle of subsidiarity. However, the Commission considered the views expressed and the discussions among the co-legislators, the European Parliament and the Council, and recognised that its proposal was unlikely to gather the necessary political support for its adoption. The Commission therefore decided to withdraw the proposal.

12 The Commission gave reasons for its decision in Communication COM(2013) 851 on the review of the proposal for a Council Regulation on

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the establishment of the European Public Prosecutor's Office with regard to the principle of subsidiarity, in accordance with Protocol No 2, dated 27 November 2013.

13 The negotiations took place under 9 Presidencies of the Council of the EU (Lithuania, Greece, Italy, Latvia, Luxembourg, the Netherlands, Slovakia, Malta, and Estonia), and required around 90 Council Working Group meetings (COPEN), 12 high-level official meetings (CATS), and 16 JHA Council meetings.

14 The European Parliament gave its consent on 5 October 2017 pursuant to Art. 86 TFEU. The Parliament adopted three resolutions on the EPPO Regulation: resolution of 12 March 2014 with Interim Report by Rapporteur Salvatore Iacolino, EPP/IT (A7-0141/2014), resolution of 29 April 2015 with Interim Report by Rapporteur Monica Macovei, EPP/RO (A8-0055/2015), and resolution of 5 October 2016 under Rapporteur Barbara Matera, EPP/IT (B8-1054/2016).

15 On 7 February 2017, the Council registered the absence of unanimity on the draft Regulation. In accordance with the second subparagraph of Art. 86(1) TFEU, a group of 17 Member States requested, by a letter dated 14 February 2017 that the draft Regulation be referred to the European Council. The draft Regulation was discussed by the European Council on 9 March 2017 and noted a disagreement in accordance with the third subparagraph of Art. 86(1) TFEU. On 3 April 2017, 16 Member States (Belgium, Bulgaria, the Czech Republic, Cyprus, Germany, Greece, Spain, Finland, France, Croatia, Lithuania, Luxembourg, Portugal, Romania, Slovenia, Slovakia) notified the European Parliament, the Council and the Commission of their wish to establish the EPPO under enhanced cooperation. By letters dated 19 April 2017, 1 June 2017, 9 June 2017 and 22 June 2017, respectively, Latvia, Estonia, Austria and Italy indicated their wish to participate in the establishment of the enhanced cooperation.

16 Cf. Regulation No 883/2013 of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) for the comprehensive mandate of OLAF.

17 Cf. Council Decision on the strengthening of Eurojust and amending Council Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime.

18 Cf. Art. 5(1) of Regulation 883/2013.

19 Cf. Art. 6(1) of the Commission proposal.

20 Appointed by the Council and the European Parliament for a non-renewable term of seven years, Art. 14(1).

21 Appointed by the Council for a non-renewable term of 6 years with the possibility to extend the mandate for a maximum of 3 years at the end of the 6-year period, Art. 16(3).

22 Cf. Art. 9(1). Two Deputies will be appointed from amongst the European Prosecutors pursuant to Art. 11(2).

23 Art. 19. Note also the role of the Administrative Director in the context of exceptionally costly investigative measures pursuant to Art. 91(6).

24 Appointed by the College for a renewable term of five years, Art. 17(1). There shall be two or more European Delegated Prosecutors per Member State, under the conditions set out in Art. 13(2).

25 Cf. Art. 7 of Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, as amended.

26 Cf. Art. 9(2).

27 For more examples cf. e.g. Art. 15(1) on the appointment of the Deputies, Art. 16(7) on the designation of a substitute European Delegated Prosecutor, Art. 77(1) on the designation of the Data Protection Officer, Art. 78(5) on the adoption of implementing rules concerning the Data Protection Officer. On the voting procedure in the EPPO College cf. Art. 9(5).

28 Cf. however Art. 28(4), which allows in exceptional cases and with the approval of the competent Permanent Chamber that the supervising European Prosecutor conducts the investigations under the conditions mentioned in the provision.

29 Art. 13 also allows the European Delegated Prosecutors to be “double hatted”, meaning that they will be “European”, i.e. acting at European level, when investigating and prosecuting cases falling within the competence of the EPPO, but they may also prosecute national cases in their function as national Public Prosecutors at the same time.

30 Cf. Art. 26(4) and the exceptions mentioned in the provision.

31 But he cannot vote in respect of the delegation of decision-making powers of the Permanent Chamber (Art. 10(7)), allocation or reallocation under Art. 26(3-5) and 27(6), and on bringing a case to judgment in accordance with Art. 36(3) where more than one Member State has jurisdiction for a case, as well as the situations described in Art. 31(8).

32 Cf. Art. 12(2) subject to the conditions laid out in that provision.

33 Cf. recital 59 which sheds light on the meaning of “repercussions” stating that “a particular case should be considered to have repercussions at Union level, inter alia, where a criminal offence has a transnational nature and scale, where such an offence involves a criminal organisation, or where the specific type of offence could pose a serious threat to the Union’s financial interests or the Union institutions’ credit and Union citizens’ confidence.”

34 Cf. recital 56 on the notion of “instrumental” which states that [t]he EPPO should also have the right to exercise competence in the case of inextricably linked offences where the offence affecting the financial interests of the Union is not preponderant in terms of sanctions levels, but where the inextricably linked other offence is deemed to be ancillary in nature because it is merely instrumental to the offence affecting the financial interests of the Union, in particular where such other offence has been committed for the main purpose of creating the conditions to commit the offence affecting the financial interests of the Union, such as an offence strictly aimed at ensuring the material or legal means to commit the offence affecting the financial interests of the Union, or to ensure the profit or product thereof.”

35 Cf. also recital 60 which states that “[w]here the EPPO cannot exercise its competence in a particular case because there is reason to assume that the damage caused, or likely to be caused, to the Union’s financial interests does not exceed the damage caused, or likely to be caused, to another victim, the EPPO should nevertheless be able to exercise its competence provided that it would be better placed to investigate or prosecute than the authorities of the respective Member State(s). The EPPO could appear to be better placed, inter alia, where it would be more effective to let the EPPO investigate and prosecute the respective criminal offence due to its transnational nature and scale, where the offence involves a criminal organisation, or where a specific type of offence could be a serious threat to the Union’s financial interests or the Union institu-

tions’ credit and Union citizens’ confidence. In such a case the EPPO should be able to exercise its competence with the consent given by the competent national authorities of the Member State(s) where the damage to such other victim(s) occurred.”

36 Cf. Art. 28(1) and recital 69. “The EPPO should rely on national authorities, including police authorities, in particular for the execution of coercive measures. Under the principle of sincere cooperation, all national authorities and the relevant bodies of the Union, including Eurojust, Europol and OLAF, should actively support the investigations and prosecutions of the EPPO, as well as cooperate with it, from the moment a suspected offence is reported to the EPPO until the moment it determines whether to prosecute or otherwise dispose of the case.”

37 Cf. Art. 28(3). On proposal of the supervising European Prosecutor, the Permanent Chamber “can decide to reallocate a case to another European Delegated Prosecutor in the same Member State when the handling European Delegated Prosecutor: a) cannot perform the investigation or prosecution; or b) fails to follow the instructions of the competent Permanent Chamber or the European Prosecutor.”

38 Cf. Art. 28(4). This procedure requires the approval of the competent Permanent Chamber and allows the supervising European Prosecutor to either undertake the investigation himself or to instruct the competent authorities. By reference to the efficiency of investigation or prosecution, the Regulation provides for three alternative criteria to apply to this procedure:

“a) the seriousness of the offence, in particular in view of its possible repercussions at the Union level; b) when the investigation concerns officials or other servants of the Union or members of the institutions of the Union; c) in the event of failure of the reallocation mechanism provided for” in Art. 28(3).

39 Cf. Art. 31(3) and recital 72.

40 Cf. Art. 31(6). Recital 73 stipulates in this regard that this possibility “should not replace the specific rules on cross-border investigations under this Regulation. It should rather supplement them to ensure that, where a measure is necessary in a cross-border investigation but is not available in national law for a purely domestic situation, it can be used in accordance with the national law implementing the relevant instrument, when conducting the investigation or prosecution.”

41 Cf. Art. 32. This Article further provides that “formalities and procedures expressly indicated by the handling European Delegated Prosecutor shall be complied with unless such formalities and procedures are contrary to the fundamental principles of law of the Member State of the assisting European Delegated Prosecutor.”

42 Cf. Art. 33(2). Recital 75 notes in this context that the provisions of the EPPO Regulation “relating to pre-trial arrest and cross-border surrender should be without prejudice to the specific procedures in Member States where judicial authorisation is not required for the initial arrest of a suspect or accused person.”

43 Cf. Art. 34(3). This paragraph ensures that “[w]here, with regard to offences which caused or are likely to cause damage to the financial interests of the Union of less than EUR 100 000, the College considers that, with reference to the degree of seriousness of the offence or the complexity of the proceedings in the individual case, there is no need to investigate or to prosecute a case at Union level and that it would be in the interest of the efficiency of investigation or prosecution, it shall in accordance with Art. 9(2), issue general guidelines allowing the Permanent Chambers to refer a case to the competent national authorities.”

44 Art. 39(1) lists the following grounds: “(a) the death of the suspect or accused person or winding up of a suspect or accused legal person; (b) the insanity of the suspect or accused person; (c) amnesty granted to the suspect or accused person; (d) immunity granted to the suspect or accused person, unless it has been lifted; (e) expiry of the national statutory limitation to prosecute; (f) the suspect’s or accused person’s case has already been finally disposed of in relation to the same acts; (g) the lack of relevant evidence.”

45 Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (*OJ L 280*, 26.10.2010, p. 1).

46 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (*OJ L 142*, 1.6.2012, p. 1).

47 Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (*O.J. L 294*, 6.11.2013, p. 1).

48 Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (*O.J. L 65*, 11.3.2016, p. 1).

49 Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings (*OJ L 297*, 4.11.2016, p. 1).

50 See, e.g., judgment of the ECJ (Grand Chamber) of 3 October 2013, case C-583/11 P, *Inuit*, paras. 91 and 92, and Opinion 1/09 of the ECJ (Full Court) of 8 March 2011, paras. 65 to 70.

51 This follows from Art. 19. The Court has, however, jurisdiction in specific cases where the national law refers to the content of a provision of Union law (see e.g., the judgment of the ECJ of 17 July 1997, case C-28/95, *Leur-Bloem*, paras. 25 and 27) or where the Court must provide all points of interpretation necessary for the national court to assess the compatibility with fundamental rights of national law implementing Union law (see Art. 51 of the EUCFR as interpreted by the ECJ in the judgment (Grand Chamber) of 26 February 2013, case C-617/10, *Åkerberg Fransson*, para. 19. See also the interpretation by the Court of "implementing Union law" in the judgment of 10 July 2014, case C-198/13, *Julian Hernández and Others*).

52 On 3 October 2017, the Commission report on the Evaluation of the application of Regulation 883/2013 (COM(2017) 589) and the Staff Working Document on the evaluation of Regulation 883/2013 accompanying the Commission report (SWD(2017) 332) were transmitted to the European Parliament and Council.

53 Art. 20 entrusts this function to the European Commission.

The European Public Prosecutor's Office – More Effective, Equivalent, and Independent Criminal Prosecution against Fraud?

Dr. Lothar Kuhl*

Introductory Remarks

Twenty years after the presentation of a study entitled "corpus iuris,"¹ and after four years of negotiations, an agreement has been found to set up the European Public Prosecutor's Office (EPPO) by means of enhanced cooperation.²

A joint statement by the institutions on its financing was adopted at the meeting of the budgetary trilogue on October 18, 2017,³ paving the way for implementation. It will take at least another three years, however, before the EPPO is fully set up and operational.⁴ The adoption of the regulation is a decisive step in the completion of the institutional settings for the protection of the EU's financial interests. It is therefore worth looking back at the origins of the project and recalling its underlying rationale (I), critically analyzing the legislative procedure (II.), studying the contents of the compromise reached (III.), and provide insight into the requirements for efficient operation of the EPPO in cooperation with its partners (IV.), before suggesting some concluding remarks and perspectives for future reform (V.).

I. The Rationale of the Project – Motives and Challenges

The EU has no complete criminal justice system of its own. It relies largely on Member State action to protect the EU's interests against prejudice caused by criminal conduct.

1. The need for action

Since the outset, the absence of EU-criminal judicial competences has been a source of potential disparities in enforcement efforts and of an internal fragmentation of the EU-territorial scope of action, due to the limited competence of each of the national authorities intervening in the fight against EU fraud. Experience has shown that cooperation and mutual assistance are frequently slow and often ineffective, leading in practice to the restriction of prosecutorial efforts to those select and isolated aspects of the often EU-wide offences, which may be investigated and proved by evidence, which has to be collected on the national territory of the prosecuting Member State only.

Until now, the European Anti-Fraud Office (OLAF) was the only dedicated operational service at the EU level to complement and orchestrate Member States' anti-fraud investigations, conducting own investigations⁵ and coordinating Member State authorities' protective action. But its own investigation means are limited to the conduct of administrative inquiries, and the final reports have no binding effect.⁶ Statistics drawn up by OLAF on action taken by national judicial authorities, following recommendations issued to accompany its final case reports, show continued disparities in the speed of action taken by the Member States' criminal investigation and law enforcement services and in the rate of indictment decisions taken by national prosecutors. On average, only half of OLAF's judicial recommendations lead to indictments.⁷

In 2016, fraudulent irregularities were reported by Member States in about 1400 cases. They involved the amount of nearly 400 million euros.⁸ Reporting of fraudulent irregularities by Member States to the Commission remains very unequal, however, and presumably not all Member States report fraud cases systematically and in a timely manner. The OLAF case practice illustrates that the average speed of investigation and prosecution of fraud offenses remains slow. A considerable percentage of OLAF cases transmitted to national judicial authorities with criminal suspicions are even never indicted.

A solution is therefore needed to remedy this situation. The expectations for improvement also extend to a more just and equivalent quality of criminal law action. The protection of EU values, such as effective implementation of procedural safeguards, fundamental rights, and judicial guarantees should also be promoted by an EU prosecution office, applying a common set of rules in accordance with EU-wide judicial standards.

2. The "European prosecutor" project

Against this background, the "corpus iuris" study in 1997⁹ launched the idea of a new approach: While criminal justice and the trial phase of the procedure should, as a matter of principle, remain within the competence of the national judiciary, a EU prosecutor for the protection of the EU's financial interests (vested with criminal investigation and indictment powers) should – in the area of anti-fraud and anti-corruption – offer a genuine European response to the problems of fragmentation and heterogeneity of the EU-judicial and prosecutorial area. Based on a common set of EU offenses and procedural powers, the EU prosecutor was designed to exert criminal law action in the entire EU territory in a decentralized but streamlined, united office framework. The specialized nature of its competences would achieve a higher level of professional

skills and prosecutorial know-how, tailored to the specific needs of transnational financial crime. This is considered particularly necessary for the protection of the EU's financial interests, an area where the EU's administrative legal context of the committed offences pre-determines – and strongly impacts on – the challenges and chances of a successful prosecutorial criminal law implementation.

The "corpus iuris" and the comparative law analysis, which was subsequently launched to complement and revise it,¹⁰ led to an intense debate structured by a public consultation organized by the European Commission on the basis of its Green paper in 2001.¹¹ At first, the Nice inter-governmental conference still ignored the new project, inserting a provision about the EU-judicial coordination unit Eurojust into the Treaty instead of the Commission contribution, proposing a Treaty provision to set up a European Prosecutor.¹² But in 2002, the topic re-appeared on the institutional agenda at the Convention for an EU Constitution. Following a very controversial debate in the justice working group of the Convention, the EU-prosecutor project was carried, vigorously supported by members from the EU Parliament and the Commission. The drafting of the provision on the EPPO in the Constitution, however, reflects several compromises, which ultimately found their way into the relevant Lisbon Treaty provisions.

This entailed a strong impact on the subsequent political and legislative process. At first, the relevant provisions of the Lisbon Treaty do not directly set up the European (Public) Prosecutor. Its creation was instead left to the secondary legislator who may set up the prosecutor's office "from Eurojust." (Art. 86(1) TFEU) Furthermore, the initial denomination "European Prosecutor" was abandoned for seeming to overly empower one person (monocratic) and replaced by "European Public Prosecutor's Office" (EPPO). The legal basis limits the EPPO's original scope of competences to offences against the EU's financial interests.¹³ More problematically, the Lisbon Treaty article does not foresee the ordinary legislation procedure but a special legislative procedure, subject to unanimity in the Council and requiring mere approval of the result of negotiations by the European Parliament.¹⁴ Considering that unanimity between all Member States might be difficult to achieve, the Lisbon Treaty finally added the relevant article provisions on enhanced cooperation.¹⁵

II. The Legislative Procedure – A Good Example of Clear Legislation and Strong EU-Democratic Legitimacy?

After the entry into force of the Lisbon Treaty on 1 December 2009, it took nearly four years for the Commission to come up with a proposal. Soon after the Treaty reform, the controversy

on the necessity of an EPPO resurfaced. The Stockholm programme gave priority to an assessment of the implementation of the reform of Eurojust.¹⁶ The European Public Prosecutor project was presented as a remote option.

But the Commission remained committed to the EPPO project. In 2009, the Spanish Presidency organised an expert workshop and presented a concept paper.¹⁷ A further study was commissioned to prepare an in-depth reflection on the procedural framework required for EPPO investigation measures and criminal indictment.¹⁸ Stakeholder consultations included all interested communities, the ministries of justice, the prosecutors general as well as European defense lawyers and other interested associations. The fear, however, that a proposal might be rejected by an overwhelming majority of Member States remained until 2012.¹⁹ Finally, at a Berlin stakeholder conference in autumn 2012, conclusions expressing support for the project were backed by the justice ministries of some previously non-supportive bigger Member States.

1. The Commission's proposal

Ultimately, the “Barroso II”-Commission presented the proposal for a regulation to set up the EPPO in July 2013.²⁰ The proposal was prepared by a group of Commission services, including DG JUST, OLAF, and the Legal service. The preparatory impact assessment²¹ developed different options, ranging from a slightly reinforced coordination function of Eurojust to a centralized European prosecution office that would be completely disconnected from the national judicial systems. The rationale of the preferred “middle-ground” option is based on a cost-benefit analysis and relies on an intervention logic, which comprises the following three key aspects:

First, the 2013 Commission proposal aimed at swifter and at equivalent prosecutorial action in the fight against fraud throughout the EU, in accordance with high quality standards. It gives preference to a decentralized and integrated but clearly streamlined European office, in which a balance is kept between the decentralized structures of the office, with double-hatted delegated European prosecutors vested with operational powers and very light central structures. The delegated prosecutors are embedded in the Member States' judicial systems. A slim, centralized, hierarchical head office, with the European prosecutor at its head, offers short lines of communication combined with the power to give instructions in individual cases.

Second, the Commission proposal aimed at a better governance and a more systematic and timely control of all relevant information about suspicions of criminal conduct against the EU's financial interests. The material scope of the EPPO's

competences for financial offenses affecting EU interests is exclusive,²² with access to all relevant information. The proposal also drew up an EU legal framework for the procedural measures of the EPPO, equipping it with a catalogue of investigative powers, whose essential conditions of proportionality, ex-ante judicial authorization, and further individual guarantees, such as judicial review remedies, apply equally in all Member States. They were spelled out in the draft regulation, reference being made to the national legislator only for more detailed procedural formalities.²³

Third, the Commission proposal offered a solution to the need to overcome the fragmentation of the EU's judicial space. The proposed EPPO design facilitates criminal investigation and prosecutorial action in transnational cases without the need to use mutual legal assistance instruments. The decentralized prosecutor initially entrusted with the investigation in a Member State is also foreseen as being competent for conducting investigations elsewhere in the EU, as the case may be in close liaison with his decentralised EU prosecution partners in the other Member State. The Commission proposal consequently developed the single judicial area concept and provided for EU-wide investigative powers on the part of each prosecuting member of the European office, thus abandoning the need for assistance requests and judicial decisions for execution addressed to “partner” prosecutors in the offices of another Member State.²⁴ The anticipated efficiency gains would enable a higher indictment rate and faster criminal procedures.

2. The negotiations

Whereas the Commission proposal therefore concentrated on a clear rationale of operational added value, the negotiations in the Council were conducted by a strong majority of Member States with the aim to keep the EPPO's functions under their close control and retain guiding influence of their respective national judiciaries.²⁵ This tendency further accelerated as a result of the subsidiarity consultations before the national parliaments. In their motivated opinions under Treaty protocol No. 2, a relevant number of national parliaments expressed subsidiarity reservations and observations, requesting the Commission to reexamine its proposal.²⁶ The preservation of the status quo of their national judiciaries appears as an ever-present concern. Many Member States have identified a collegiate structure of the EPPO – one in which each Member State retains its own prosecutor – as being less intrusive for their judicial systems, compared with the hierarchical EPPO structure proposed by the Commission. Less priority is given to the question of the operational added value of the EPPO proposal and the justification for setting it up.

It is probably justified to say that – from the onset – these reasoned “subsidiarity” opinions have put a strong political strain on the Council negotiations. Successive Presidency drafts have indeed radically modified most of the key elements in the Commission proposal. The negotiations centered on the condition of the defense and preservation of the national judicial systems. This has exposed them to the risk of undermining the question of the EPPO’s practical added value. One should not underestimate the influence this will have on the operational benefits of the EPPO.

In its turn, the European Parliament adopted several resolutions for better synergies with Eurojust, a high standard of protection of procedural guarantees in criminal investigations conducted by the EPPO, and the effective configuration of its competences.²⁷ However, the ultimate influence of the EP’s resolutions on the content of the compromise may be considered limited. This is partly due to the shift in internal organization of the debate in the European Parliament. The civil liberties lead committee did not emphasize to the same extent the budgetary control committee’s priorities which originally caused the European Parliament to strongly support the EPPO project as an instrument to efficiently protect the EU’s financial interests against fraud.²⁸ The limited legislative impact of the European Parliament is, however, mainly due to the extraordinary procedure in setting up the EPPO, which – as mentioned above – does not allow the European Parliament to formulate legislative amendments but only to ultimately approve the Presidency draft submitted by the Council.²⁹

III. The Content of the Regulation – Main Features and Drawbacks of the Compromise

The EPPO is set up to conduct criminal investigations and prosecute PFI offences. Its function is to bring charges in the Member States, based on an EU-wide investigation mandate. Looking at the end result, the impression may be gained, however, that the primary orientation of the adopted compromise is built along the lines of the same territorial divisions previously established by national substantive and procedural law, which are responsible for the national desk structures of Eurojust, to exercise judicial coordination functions. The relevant question is whether and under what conditions the regulatory framework grants to the new body effective, EU-wide admissible criminal investigation, enforcement and prosecutorial decision powers.

A lot of creativity and sense of initiative will be needed to get this office not only up and running but also effectively working and well recognized by stakeholders at the national and European levels for its operational added value.

This challenge raises three issues: (1) Will the EPPO lead to swifter and independent judicial investigation and prosecution of cases of fraud and corruption detrimental to the EU’s financial interests? (2) Will it have a decisive added value for cases of transnational fraud? (3) Will it ultimately help to achieve better control of information on suspicions of fraud in the Union?

1. Will the EPPO contribute to the swift and independent exercise of prosecution?

The Commission proposal intended to build the EPPO on simple structures with short lines of command. That is to say, the central EPPO structure should have been slim. The four-layer model of the adopted regulation (College, chambers, European prosecutors, delegated prosecutors), however, gives rise to challenges on how to achieve the desired swiftness and improved efficiency of criminal procedures run by the EPPO.³⁰ The hierarchical EPPO structure of the Commission proposal has now been transformed into a top-heavy college of prosecutors, now twenty members strong, reflecting the number of Member States participating in enhanced cooperation.

At the operational level, the EPPO’s central structures provide collegial bodies called permanent chambers, in which the Member State involved in an investigation is always represented by “his” European Prosecutor.³¹ But it remains to be seen to what extent the chambers will ultimately reveal themselves as suitable for fast decision-making and supervision. Even when supervised by chambers, it is likely that, in the central office, the national European Prosecutor will play the key role of liaison with the delegated European prosecutor of “his” Member State operating on the ground.

Because of the need for investigation action to be based on national law,³² specific knowledge and experience of this legal system is required. A national chain of command seems a predictable dominant feature. The investigations are to be run in the respective Member States under the operational responsibility of the respective delegated prosecutors. Any instructions of the chamber to the delegated prosecutor need to go through the supervising national European Prosecutor.³³

2. Can the EPPO investigate without borders?

As an independent European prosecution office, the EPPO is supposed to be able to operate across the national borders of its participating members. The EPPO was conceived in order to do away with mutual legal assistance. However, is the agreed framework fit to achieve this aim? The regulation limits it-

self by referring to a common, minimum set of investigation measures (search of premises, freezing of assets, interception of communications), which need to be made available to the prosecutor's office for significant offences in all participating Member States.³⁴ The EPPO regulation assigns this objective of mutual criminal procedural law provisions to the national legislator. The question, however, remains as to whether a mere reference to investigation measures under national law is sufficient to satisfy the need for an EU-wide admissibility of measures decided. The fear exists that the measures will be legally provided under the various systems of national procedural law, without automatic European admissibility of the judicial decisions and measures taken.³⁵ This potentially reproduces a degree of fragmentation within the structure and the functioning of the EPPO, which needs to be brought into harmony with its objectives and its status as “an indivisible Union body operating as one single Office.”³⁶

As a consequence, the challenge remains as to how to achieve a systematic European admissibility and EU-wide legal effect of the investigation acts to be performed by the EPPO, so that they are of such a nature as to achieve more efficient investigation and prosecution in transnational cases. The function of the European Chief Prosecutor, which could potentially have achieved a unicity of the EPPO's actions, has been deprived of operational responsibilities. Like the President of Eurojust, he mainly vests a representative function³⁷ and has no supreme supervisory powers or prerogatives to give operational instructions.

All investigation measures are based in the Member States' law.³⁸ In transnational cases, the “handling” delegated prosecutors need to assign their “assisting” counterparts in the respective Member State with the relevant investigation measures in accordance with the requirements for judicial authorization as foreseen in the latter prosecutor's national procedural law.³⁹ This procedure is reminiscent of mutual legal assistance requests, and the EPPO must prove that it can achieve more effective means of investigation and prosecution in transnational cases than what is provided under the Directive on the European investigation order in criminal matters.⁴⁰

3. Does the EPPO's competence ensure comprehensive control of information about fraud?

The EPPO's material competence is defined with respect to the offences included in the “PFI Directive”.⁴¹ Harmonized offences include non-procurement and procurement fraud, customs revenue fraud, and VAT revenue fraud, as well as active and passive corruption, and money laundering of the relevant proceeds. At a closer look, however, the material competence of the EPPO is defined in rather complicated terms. The scope

of the criminal law directive adopted in 2017 serves as reference frame with its harmonized financial criminal offences.⁴² It “Lisbonises” the former Convention on the protection of financial interests of the Communities and its (additional) protocols. But the EPPO does not have a full competence as illustrated by the following three limitations.

First, as a result of the negotiations, the EPPO will have no exclusive competence, but a right of evocation.⁴³ *De minimis* threshold provisions have been included,⁴⁴ which are likely to give rise to interpretation and speculation about the financial impact of the suspicions under investigation at the outset of a criminal procedure. VAT offences are only covered if they are transnational and beyond a prejudice threshold of ten million euros.⁴⁵ It will be difficult to determine the damage in this order of magnitude.

Second, the provisions concerning offences that are “inextricably linked” with offences contained in the PFI Directive are fairly ambivalent. The requirement that the EU-financial prejudice needs to exceed the damage caused, or is likely to be caused to another victim,⁴⁶ has fortunately been narrowed down and does not extend to expenditure-fraud offences in the PFI Directive.⁴⁷ But what does this mean if there exist inextricably linked non-directive offences? This restriction of the EPPO's competence applies, however, for revenue-fraud offences other than transnational VAT-fraud above €10 million damage. It deprives the EPPO of the material competence for the vast majority of customs fraud cases, affecting products for which VAT and excise duties are also evaded.

Third, the reference to the equal or superior level of maximum sanctions for a non-directive offence inextricably linked with a harmonized offence is an exclusion criterion, “unless the (linked) offence has been instrumental to commit the (harmonized) offence.”⁴⁸ This will give rise to considerable interpretation. Hopefully, that will not lead to loopholes in the substantive law competence of the EPPO.

Finally, one cannot ignore that all the above-mentioned uncertainties on the scope of action will have an impact on the extent to which information about criminal suspicions of fraud are equivalently and effectively transmitted to the EPPO by the participating Member States. Hope remains that the EPPO will not need to invest most of its resources to wage battles of competence during a long period of consolidation. Numerous potential conflicts of competence could be clarified by guidelines, to be adopted by the College.

Otherwise, the consequence might be a limited added value of the new EPPO. It needs to be shown that the original objectives behind the setting up of the EPPO are fully achievable now,

based on the complicated compromise text agreed. This puts the complex burden of implementing the results of the negotiations on those who will act on the ground. The compromise unanimously reached between participating Member States has left numerous questions unanswered. One should also be aware of the fact that the adoption of the EPPO regulation under procedures of enhanced cooperation raises challenges for the equivalent protection of the EU's financial interests against fraud. If states like Poland and Hungary do not participate in the future, the EPPO cannot fulfill its fundamental role of protecting the EU and its financial solidarity interests in an efficient and comparable way within the EU territory.

IV. The Challenges Ahead for Implementation – Efficiency Gains and Increased Synergies of the EPPO with Its Investigation Partners

Effective prosecution depends on the successful collection of information and criminal investigation. The EPPO is intended to steer this function. But it is not able to act alone. The effectiveness of the EPPO will greatly depend on the availability of relevant information and on the efficient work of its investigation partners. The EPPO and OLAF will both be responsible for the protection of the EU's financial interests and investigations against fraud. Their specialized material scope of activities is similar. Both services are vested with a mission to fight EU fraud. But there is a need to specify the complementarities between the EPPO and the OLAF functions (1), and it is even more important to determine the synergies between both bodies (2).

1. Complementarities

The scope of the investigation mandate of OLAF extends beyond the mandate for criminal prosecution by the EPPO, and its administrative investigations refer to a different level of suspicion. The EPPO will not fully substitute OLAF. OLAF is further needed, as there may be numerous scenarios in which the EPPO cannot investigate (see above), does not wish to investigate, cannot yet investigate, or no longer investigates. As a matter of principle, OLAF's mandate retains its full justification. As a Commission service acting under Art. 325 TFEU, OLAF needs to preserve a specific responsibility. Its anti-fraud mandate contributes to the proper execution of the European budget, exchanging information in close cooperation with the managing and authorizing authorities. Preventive measures to protect the EU's financial interests and ensure recovery of illegally obtained financial benefits will further need to be taken in the future, irrespective of the perspectives of an EPPO procedure to establish criminal liability.⁴⁹ OLAF's mandate goes far beyond the specific matters for which the EPPO will have

material competence, because it also includes internal investigation cases not involving the EU's financial interests and minor financial fraud cases (in which the amount at stake is under the €10,000 threshold) as well as potentially VAT-fraud cases below a prejudice of €10 million. It also includes investigations in Member States such as the Netherlands, Malta, Poland, and Hungary, which currently have not yet voiced their readiness to participate in the EPPO and to recognize its competence on their respective territory.

The detection and control of a case that may prejudice public EU finances largely requires – before clear-cut criminal suspicions may be established – upfront action by administrative investigation services. These services need to detect and collect relevant information about possible fraud cases, often far before a criminal investigation based on sufficient suspicion can begin. Administrative investigation services obviously include competent managing and audit services, but more specifically anti-fraud services like OLAF.

OLAF is currently undergoing an evaluation of its legal framework. The idea is to build a close relationship with the EPPO because of the need to work closely together. Accordingly, the evaluation report of the Commission points out the need to clarify and complete OLAF's administrative investigation powers.⁵⁰ In the future, their exercise will require the exchange of information and cooperation with the EPPO at various stages. OLAF and the EPPO will share their sources of incoming information, including information from databases. OLAF's operational (case) activity needs to be coordinated regarding any issues for which the EPPO might be competent on the prosecution side. Hence, the functions of OLAF need to be adapted to the presence of the EPPO. Double jeopardy of both administrative and criminal investigations undertaken in parallel needs to be avoided.

The OLAF evaluation report proposes defining complementarities at the different operational stages of OLAF's work.⁵¹ First, OLAF will be responsible for administrative investigations, whereas the EPPO should steer criminal investigations. For sake of coherence, OLAF may need to communicate and cooperate with the EPPO *before* opening its own administrative investigation, in order to avoid interference with criminal cases in case of sufficient criminal suspicions and the loss of time and resources due to uncoordinated parallel investigations. Second, it may also need to relay to the EPPO any suspicion of criminal offences that come to its knowledge *during* the administrative investigation as well as share relevant information. Third, in such situations, OLAF may regularly need to cooperate with the EPPO within and *after* its own (administrative) investigation in order to follow up its results and recommendations.

Because of the continued need for an OLAF administrative investigation function and the non-exclusive mandate of the EPPO to investigate and prosecute fraud, the assessment of its staffing needs was recently adapted in the legislative financial statement of the Commission, limiting the transfer of posts from OLAF to the EPPO to 45, as compared with 118 in the initial calculation.⁵²

2. Synergies

Beyond the complementarity of administrative OLAF and criminal EPPO investigations, the crucial issue remains as to how to develop optimal synergies in open EPPO investigations. Only if this is achieved, can an operational added value benefiting from the potential of both offices emerge. Therefore, the more critical challenge for cooperation between the EPPO and OLAF arises when the EPPO itself actually opens the investigation of a case. As a matter of principle, OLAF then should not investigate independently. It is bound to cooperate with the EPPO during the criminal investigation. The EPPO may call on OLAF's support during its investigation.⁵³ In a cooperation with national prosecution services, this support currently includes OLAF's technical and operational assistance in criminal investigations. Such assistance will obviously encompass information exchange and the submission of documents, for instance information comprised in OLAF final case reports. It may sometimes also require OLAF to conduct administrative investigations.

In an open EPPO investigation, however, the question of course arises as to which extent – in case of need, based on a request, and in accordance with the instructions of the EPPO – OLAF should be able to do more. This includes continuing the collection of evidence, also using specific investigation measures available only within criminal investigation procedures. It is to be expected that at least in some cases effective and swift prosecution will depend on an efficient investigation partner at the EU level during the criminal procedure run by the EPPO. In respect of criminal enforcement powers, however, the EPPO regulation remains nearly exclusively based on traditional competences. Irrespective of the administrative preparatory detection and investigation carried out by OLAF, the EPPO will systematically need to liaise with the national criminal investigation partners in the Member States.⁵⁴ If the enforcement authorities are acting only under national law to prepare prosecution, this will likely reproduce the shortcomings of the current system. A European prosecution relying exclusively on national criminal investigation and enforcement will not fully overcome territorial fragmentation. The national enforcement services can and must already intervene in the fight against fraud. However, they do so with territorial re-

strictions and the great disparity of results that the EPPO is supposed to overcome.

A great challenge for EPPO efficiency therefore results from the criminal investigation and enforcement function of OLAF (at the request and at the service of the EPPO), in addition to and distinct from OLAF's administrative investigation function. This function should be entrusted to a specific and distinct unit in OLAF. It should be based on separate regulatory provisions under Art. 325 TFEU. Consideration should therefore be given to the possibility of including these “auxiliary” criminal functions in a specific chapter of the OLAF regulation (or in a separate regulation). It should also be subject to specific instructions and legal control by the EPPO, and in accordance with a specific set of rules that require compliance with criminal judicial standards and guarantees.

V. Conclusions and Perspectives

Not only the latter aspect shows: a lot of work lies ahead. The adoption of Regulation 2017/1939 is just the beginning. During the startup phase of the EPPO, the Commission will be responsible, designating the interim Administrative Director and offering the secondment of a limited number of officials.⁵⁵ Setting up the EPPO will take several years. Once the EPPO has been set up, the Chief Prosecutor needs to propose internal rules of procedure to be adopted by the College⁵⁶ and propose a date to the Commission for assuming the investigation and prosecutorial tasks conferred on it.⁵⁷ Implementation will be a tough challenge, at least as difficult as the negotiations themselves have been. Looking further ahead, the adoption of the EPPO Regulation is probably not the ultimate achievement of justice instruments in the European Union. A reflection on the future of the European Union has already been launched by the Commission.⁵⁸ Different scenarios are conceivable for the ultimate development of the European prosecution function. Based on the current compromise, at least three perspectives require further analysis and closer scrutiny:

First, a considerable effort will need to be made to invest in common training schemes for all EPPO prosecutors, whether centralized or decentralized. To this end, a specific academic and professional framework needs to be put in charge with the planning and development of courses in accordance with a joint curriculum based on EU principles and case law on matters of justice and criminal law.⁵⁹ On this basis, a mutual tradition, doctrine, and guidance could emerge, as a precondition of the EPPO as a single authority. Second, in order to effectively order criminal investigation and prosecution measures across the EU, the EPPO needs criminal investigation and enforcement support. Some provisions to address this need have already

been enshrined in the Regulation.⁶⁰ The exercise of criminal investigation measures, however, lies mainly with the national enforcement services. This might be close to the status quo and be insufficient. Investigation measures undertaken by the supervising European prosecutor will mostly be the exception and will also need to be activated under national law.⁶¹ Operational added value and a genuine change would therefore come from OLAF having an EU criminal investigation function. OLAF's current legal framework should be completed with appropriate provisions, specifying modalities and conditions for the exercise of criminal investigation measures, on behalf and upon request by the EPPO.⁶²

Third, looking at the result currently achieved by the adoption of the EPPO Regulation, it might come as a surprise to see a second EU judicial body set up with functional prerogatives similar to those of Eurojust.⁶³ The question is therefore justified: should the EPPO and Eurojust, two judicial bodies with similar responsibilities and support functions for prosecution services, ultimately be joined together? After a successful pilot phase, it is worth reflecting on whether the EPPO should absorb and reinforce Eurojust. It might indeed yield efficiency gains if both bodies were to merge and share experience as well as administrative, technical, and operational resources.



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* The opinions expressed in this article do not reflect those of the European Commission and are personal opinions of the author.

1 Corpus iuris on criminal law provisions for the protection of the financial interests of the European Union, external study by M. Delmas-Marty, 1997.

2 Council Regulation (EU) 17/1939, *O.J.* L 283, 31.10.2017, p. 1 (in the following referred to as the "EPPO Regulation"). See further also the article of Csonka, Juszcak and Sason in this issue as well as the summary of T. Wahl in the news section of this issue.

3 Joint Statement of Parliament, Council and Commission, Council Document 13380/17, 19.10.2017; it confirms that the financing of the EPPO is ensured up to the agreed expenditure ceiling of relevant heading 3 of the multiannual 2014–2020 financial framework; the annual EU contribution to the EPPO budget for 2019 and 2020 will be decided within the framework of the annual budgetary procedure.

4 See Art. 120 (2) sub-paragraph 3 of the EPPO Regulation.

5 Regulation (EU, Euratom) 883/2013 of the European Parliament and of the Council concerning investigations conducted by the European Anti-Fraud Office (OLAF), *O.J.* L 248, 18.9.2013, p. 1.

6 Regulation (EU) 2013/883.

7 The OLAF Report 2016, point 4.2 and figure 12, p. 33.

8 See Commission Report on the protection of the financial interests of the European Union, Fight against fraud, Annual report 2016, 20.7.2017, COM (2017) 383, point 2.3.1. pp. 15 et seq.

9 See endnote 1 *supra*.

10 M. Delmas-Marty/J.A.E. Vervaele, *The implementation of the corpus iuris in the Member States*, 2000, referred to as the revised Florence version of corpus iuris.

11 Green paper on criminal law protection of the Communities' financial interests and the setting up of a European Prosecutor, COM (2001) 715, 11.12.2001.

12 Commission contribution to the Intergovernmental Conference on institutional reform: Criminal law protection of the Communities' financial interests, COM (2000) 608, 29.9.2000.

13 An extension to include serious crime having a cross-border dimension is foreseen in Article 86 (4) TFEU, but subject to unanimous decision by the European Council. For the aspect on the extension of EPPO's mandate see the contributions of F. Giuffrida and C. Di Francesco Maesa, in this issue.

14 Article 86 (1), sub-paragraph 1, second sentence TFEU.

15 Article 86 (1), sub-paragraphs 2 and 3 TFEU, with reference to Art. 20 TEU and Art. 329 TFEU.

16 *O.J.* C 115, 4.5.2010, 1; see, in particular, point 3.1.1., p. 13: "On the basis of an assessment of the implementation of (Council Decision 2009/426 on the strengthening of Eurojust), 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."

17 European Public Prosecutor Working Group, conclusions, Madrid, 29.6.–1.7.2009.

18 K. Ligeti, *Draft EU model rules of criminal procedure*, University of Luxembourg, March 2012.

19 For an overview of the consultations undertaken, see the explanatory memorandum to the Commission proposal, COM (2013) 534.

20 Proposal for a Regulation of the Council setting up the European Public Prosecutor's Office, COM(2013) 534, 17.7.2013.

21 SWD (2013) 274.

22 Article 11 (4) of the proposal, COM(2013) 534.

23 Article 26 (1)–(6) of the proposal.

24 Article 25 of the proposal.

25 On the history of the negotiations, see: L. Kuhl and R. Panait, "Les négociations pour un Parquet européen: un organe d'enquête et de poursuite européen pour la lutte antifraude dans l'Union européenne, ou un deuxième acteur de coordination judiciaire", (2017) *Revue de science criminelle et de droit pénal comparé*, 41.

26 See, in response, the Communication of the Commission to the European Parliament, the Council and the national parliaments, COM(2013) 851, 27.11.2013.

27 See also the study by A. Weyembergh and C. Briere, *Towards a European Public Prosecutor's Office (EPPO)*, mandated by the thematic department of civil liberties and constitutional matters of the European Parliament, November 2016 (Internet publication).

28 The funds for the corpus iuris study were included in a specific budgetary line for the 1996 budget, inserted at the initiative of the European Parliament.

29 European Parliament legislative resolution on the draft Council regulation implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ("the EPPO") (09941/2017 – C8-0229/2017 – 2013/0255 (APP)), rapporteur Barbara Matera.

30 For the structure of the EPPO, see also the article of A. Met-Domestici, in this issue.

31 Art. 10 (9) of the EPPO Regulation.

32 See Art. 28.
 33 Art. 10 (5).
 34 See Art. 30.
 35 See also Commission declaration, Council Document 9476/17, 7.6.2017, with reference to Recital 70 EPPO Regulation. In the Commission's view, it lacks clarity on relevant limitations that may apply according to national law.
 36 See Art. 8(1).
 37 See Art. 11 (3).
 38 See Art. 30.
 39 See Art. 31.
 40 Directive 2014/41/EU, 3.4.2014, *O.J.* L 130, p. 1, in particular Art. 9.
 41 Directive (EU) 2017/1371 of the European Parliament and the Council on the fight against fraud to the Union's financial interests by means of criminal law, 5.7.2017, *O.J.* L 198, p. 29; see, in particular, Art. 3 (fraud) and Art. 4 (corruption). See for the Directive, A. Juszczak and E. Sason, "The Directive on the Fight against Fraud to the Union's Financial Interests by Means of Criminal Law (PFI Directive)", (2017) *eu crim*, 80.
 42 See Art. 22 EPPO Regulation.
 43 See Art. 25 and 27.
 44 See Art. 25 (2).
 45 Art. 22 (1).
 46 See Art. 25 (3) sub-paragraph 1, lit. (b).
 47 See Art. 25(3), second sub-paragraph: "Point (b) of the first subparagraph of this paragraph shall not apply to offences referred to in Article 3 (2) (a), (b) and (d) of Directive 2017/1371."
 48 Article 25 (3) sub-paragraph 1, lit. (a).
 49 See, currently, Art. 7 (6) of Regulation 883/2013 concerning investigations conducted by OLAF.
 50 Report of the Commission on the Evaluation of the application of Regu-

lation 883/2013, COM (2017) 589, 2.10.2017 and accompanying services document SWD (2017) 332.
 51 COM(2017) 589, point 4.
 52 Commission Document SI(2017) 403, 14.9.2017; for the previous calculation, see the legislative financial statement accompanying the Commission proposal for a Regulation setting up the European Public Prosecutor's Office, COM(2013) 543, 17.7.2013, p. 62.
 53 Art. 101 (3) of the EPPO Regulation.
 54 See Art. 28 (1).
 55 See Art. 20.
 56 See Art. 21.
 57 See Art. 120.
 58 European Commission, 1.3.2017, White Paper on the Future of Europe, Reflections and Scenarios for the EU27 by 2025, p. 20.
 59 See, on this subject matter, the study: Preparing the environment for the EPPO: Fostering mutual trust by improving existing common legal heritage and enhancing common legal understanding. Proposal for a preliminary study and guidelines for a model 'framework curriculum' for legal training of practitioners in the PIF sector" – (EUPenTRAIN) R. Sicurella, Centro di Diritto Penale Europeo, Catania, 2017 (to be published soon).
 60 Art. 28.
 61 See Art. 28 (4).
 62 See also: Report of the Commission on Evaluation of the application of Regulation 883/2013, COM(2017) 589, 2.10.2017, in particular point 4, p. 6: "strong synergies need to be created between the EPPO and OLAF" "to provide for the necessary mechanisms for OLAF to perform its role of operational support".
 63 See Art. 100 of the EPPO Regulation on the "close relationship" between the EPPO and Eurojust.

The Hybrid Architecture of the EPPO

From the Commission's Proposal to the Final Act

Alexandre Met-Domestici, PhD

I. Introduction

The creation of a European Public Prosecutor's Office (EPPO) has been a protracted process, which can be traced back to the early 2000s.¹ The EPPO Regulation was eventually adopted through enhanced cooperation² on 12 October 2017.³

The need for an EPPO stems from the lack of efficiency of the current EU anti-fraud mechanism. This mechanism relies on the EU's Anti-Fraud Office (OLAF)'s investigations. Its main shortcoming is in the link between OLAF and national prosecuting authorities, or rather the lack thereof.⁴ Despite the undisputed expertise of its investigators, OLAF is an administrative body and therefore only able to conduct administrative investigations. OLAF is not a judicial authority, which pre-

vents it from being able to initiate prosecutions. Hence, the follow-up to OLAF's investigations appears to be insufficient. The Office indeed has to rely on national authorities to prosecute cases and bring offenders before the national courts. The new OLAF Regulation has slightly improved this situation by having introduced the possibility for OLAF to request national prosecuting authorities to inform it of any actions they have taken in the wake of its reports. However, there is still no obligation for national authorities to prosecute.⁵

These limitations show that the protection of the EU's financial interests is still insufficient. Moreover, an EU body capable of initiating investigations at the European level and carrying out EU-wide investigations would be most welcome. Such an improved mechanism would also greatly benefit from

harmonised procedural criminal rules at the European level. In spite of the legal basis provided for in Art. 82 TFEU, the adoption of comprehensive harmonised procedural rules remains a long-term goal, although the EPPO Regulation provides for some very limited procedural rules.

The EPPO is likely to address most of these needs.⁶ It will embody a conceptual change, namely the shift from a system based exclusively on mutual recognition of investigation measures adopted by national authorities to a new mechanism also featuring decisions taken by a new European body and directly enforced in Member States.⁷ National parliaments, however, even recommended not to establish the EPPO. Within the “yellow card” procedure,⁸ they argued that there should be no European prosecutor, that criminal prosecutions should be a matter of national competence, and that the EU should maximize the use of existing legal instruments.⁹ Eighteen chambers of national parliaments have adopted a reasoned opinion, thus voting against the compliance of the proposal with the subsidiarity principle.¹⁰

Notwithstanding, the European Parliament encouraged EU institutions to establish an EPPO with a strong mandate and a good hierarchical structure. The Parliament stressed the need to adopt the EPPO in its resolution of 5 October 2016,¹¹ reaffirming its support for the proposal, with a view to reducing “the current fragmentation of national law enforcement efforts to protect the EU budget.”¹² It also called on the Council to provide “a clear set of competences and proceedings concerning the EPPO,”¹³ by including specific provisions about investigative measures in the Regulation. The competences of the EPPO are defined in reference to PIF offences, (Art. 22(1)) which are themselves defined in the Directive on the Fight against Fraud to the EU’s Financial Interests.¹⁴

The Commission’s proposal for the EPPO Regulation¹⁵ had been under negotiation within the Council for more than three years. Remarkably, the Regulation provides for shared competence between the Member States and the EPPO as regards the prosecution of PIF offences, whereas the original proposal provided for an exclusive competence of the Office.¹⁶ This should also contribute to fulfilling the subsidiarity requirement.¹⁷

The most striking change during the negotiations, however, relates to the very design of the EPPO. Member States have been advocating a shift towards a College model – allowing them to designate European Prosecutors who will be members of the European body of the Office. This change may result in an EPPO that will be less decentralized than originally foreseen in the Commission’s proposal. The currently envisaged layout can therefore be considered a mix between the decentralized and the College models.

Against this backdrop, this paper will first analyse the structure of the EPPO and then focus on specific powers that will be granted to the new body.

II. The Hybrid Structure of the EPPO

Over the course of the negotiations, the structure of the EPPO has evolved into what can be described as a “hybrid layout”. The addition of a College made up of national representatives ensures greater control on the part of the Member States over the new European Office. The EPPO will rely on a two-level structure that consists of a central, i.e. European, level which has been considerably enlarged compared to the Commission’s plans as well as a decentralized national level, which is more or less in line with the original proposal.

1. The European level

The central body of the EPPO will be headed by a European Chief Prosecutor, together with his/her Deputies and will also include European Prosecutors representing the Member States. The main work is organised both in a College and in Chambers. This institutional setting is explained in more detail in the following.

a) The European Chief Prosecutor

The European Chief Prosecutor will head, organise, and direct the work of the EPPO (Art. 11(1)). The appointment procedure is intended to guarantee the independence of the European Chief Prosecutor. His/her “independence beyond doubt” is an eligibility condition. The European Chief Prosecutor shall be appointed by the Council and the European Parliament by “common accord” for a non-renewable seven-year term (Art. 14(1)). He/she shall be chosen from a short list of candidates approved by a selection panel (Art. 14(3)). His/her two Deputies will be European Prosecutors appointed by the College (Art. 15(1)). The European Chief Prosecutor will be in charge of representing the EPPO and will have the power to delegate tasks to a Deputy (Art. 11(2), (3)).

The powers bestowed upon the European Chief Prosecutor have been reduced in comparison with those provided for in the original proposal of the European Commission. His/her role will mainly be of a managerial nature and occasionally encompass operational aspects, e.g., deviating from the random allocation of cases. He may also chair Permanent Chambers but may delegate this power to his/her Deputies or a European Prosecutor according to the internal rules of procedure (Art. 10(1)).

b) The European Prosecutors

The European Prosecutors will be designated by the Member States, thus allowing the latter to exercise some degree of control over the EPPO. There will be one European Prosecutor per Member State. Each Member State shall submit a list of three candidates to the Council, which will appoint one of them after having taken into account the reasoned opinion of a selection panel (Art. 16(1), (2)). The role of the European Prosecutors will be to supervise investigations and prosecutions on behalf of the Permanent Chamber in charge of a case. They will act as channels of information. Moreover, the European Prosecutors will monitor the implementation of the tasks of the EPPO in their respective Member State, in compliance with both national law and the instructions given by the competent Permanent Chamber (Art. 12(1), (5)). The European Prosecutors may give instructions to European Delegated Prosecutors (hereinafter: EDPs) handling cases (Art. 12(3)). Under exceptional circumstances, a European Prosecutor may carry out an investigation himself/herself. Such circumstances might depend on the seriousness of the offence, or arise when investigations concern members of EU institutions, or even arise in case of failure of the reallocation mechanism (Art. 28(4)).

c) The College

The College will comprise the European Chief Prosecutor as well as the European Prosecutors (Art. 9(1)). It will be chaired by the European Chief Prosecutor. The role of the College will be (Art. 9(2)):

- to monitor the activities of the EPPO;
- to adopt decisions on strategic matters (such as defining the prosecuting policy);
- to ensure coherence and consistency in the prosecution policy, and
- to adopt decisions on general issues arising from specific cases.

The College will also set up the Permanent Chambers (Art. 9(3)) and appoint the EDPs (Art. 17(1)) upon proposals from the European Chief Prosecutor. Furthermore, it will appoint the EPPO's Administrative Director from a list proposed by the European Chief Prosecutor (Art. 18(2)).

The College will not have operational powers and therefore not be able to take operational decisions in individual cases. It will adopt the internal rules of procedure governing the functioning of the EPPO upon proposals from the European Chief Prosecutor (Art. 21(2)). It will also define the respective "responsibilities for the performance of functions of the members of the College and the staff of the EPPO" (Art. 9(4)).

d) The Permanent Chambers

The Permanent Chambers will be headed by the European Chief Prosecutor, or his/her Deputies, or a European Prosecutor appointed as Chair of a Chamber (Art. 10(1)). Each Chamber will consist of three members, including the Chair (Art. 10(1)). All members of the EPPO at the European level are to be part of at least one chamber. The Chambers will direct and monitor the investigations and prosecutions conducted in the Member States (Art. 10(2)). They will ensure the coordination of investigations and prosecutions in cross-border cases as well as the implementation of decisions taken by the College on strategic matters and on prosecution policy matters (Art. 10(2)). To this end, the Chambers will be able to take such decisions as (Art. 10(3 and 4)):

- initiating an investigation;
- allocating a case;
- determining the Member State in which a prosecution shall be brought to court;
- bringing a prosecution to court;
- dismissing a case;
- referring a case to national authorities;
- reopening a case, or
- referring to the College strategic matters or matters of prosecution policy.

The role granted to the Permanent Chambers by the Regulation therefore appears to be extremely important. They will be responsible for making most of the key operational decisions when investigations are conducted. This is remarkable and represents a significant departure from the approach originally envisaged by the Commission. However, in cases of lesser importance, the Permanent Chambers will be able to delegate their decision-making powers to the European Prosecutors. This might increase the control exercised by the Member States over the EPPO.

2. The national level: European Delegated Prosecutors

In line with the subsidiarity principle, the EPPO will carry out investigations and prosecute at the national level. Such will be the task bestowed on European Delegated Prosecutors, who will be responsible for conducting investigations they have initiated, or taken over due to the right of evocation, or which will have been allocated to them (Art 13(1) and Art 26(1) and (2)). If several offences were committed in several Member States, the competent EDP will be from the Member State in which the bulk of offences were committed (Art. 26(4)). EDPs may also be allocated cases that were initiated in another Member State should a Permanent Chamber decide to reallocate them.

There will be at least two EDPs in each Member State (Art. 13(2)). They will be nominated by the Member States and appointed by the College upon proposal from the European Chief Prosecutor (Art. 17(1)). This is a departure from the original proposal under which EDPs were to be directly appointed by the European Chief Prosecutor. In line with the decentralised model, EDPs will “wear two hats.” They will indeed be members of both the EPPO and their own national judiciary.¹⁸ Art. 13(3) of the Regulation provides that they “may also exercise functions as national prosecutors, to the extent this does not prevent them from fulfilling their obligations” as members of the EPPO. A thorough implementation of the subsidiarity principle is apparent here, with European Delegated Prosecutors being embedded in national judicial systems.

This new hybrid architecture of the EPPO meets the Member States’ call for greater compliance with national sovereignty. But it increases the Office’s complexity, because of the added layers: the College and the Permanent Chambers. Such complexity renders the division of tasks between the various layers more complex, which may in turn lengthen procedures and investigations. The added steps resulting from the multiplication of layers may prevent the EPPO from swiftly adopting decisions and therefore hamper the effectiveness of its action. Such delays may unfortunately arise from the link between the European level and the national level of the EPPO, e.g., in case of disagreement about the handling of a case between a European Delegated Prosecutor with decisions adopted by the competent Chamber.

3. Interim Results

In comparison to the Commission’s proposal, which designed a limited central body, the size of the EPPO at the European level will increase. This increase raises the issue of the center of gravity of the EPPO, i.e., the focal point at which the most important decisions will be taken: Will they be taken at the European level or at the national level? Within the European level, will the more European-oriented authorities – the European Chief Prosecutor, his/her Deputies, and to a lesser extent the Permanent Chambers – take the most important operational decisions, or will they be taken by European Prosecutors? Or will such decisions be taken at the decentralised level by EDPs? It appears that the Permanent Chambers will play a leading role in operational matters, whereas the powers of the European Chief Prosecutor will considerably be reduced in their extent under the original proposal. At the other end, most operational decisions regarding investigations and prosecutions will fall within the responsibility of EDPs.

The envisaged layout of the EPPO takes an *integrated approach*. The central body and EDPs in the Member States will

coordinate their actions. This approach will also stem from the key role played by EDPs embedded in national judicial systems. Their double-hatted role will act as a guarantee for their integration into the national systems of criminal justice, thus allowing better coordination of their work with national law enforcement authorities.¹⁹

On a broader scale, the integrated approach will therefore serve to facilitate the cooperation of the Office with national judicial systems. One of the major improvements that the EPPO will bring is its ability to supervise investigations at the EU level and coordinate them between Member States. The smooth functioning of the Office shall be ensured by the specific powers granted to the EPPO. These will be presented in the following part III.

III. Specific Powers of the EPPO

The EPPO will be granted specific powers, with a view to ensuring a trouble-free coordination between its European and national levels, as well as with national authorities. These powers that are analysed in more detail in the following are:

- to allocate cases;
- to evoke cases, and
- to adopt investigative measures.

1. The power to allocate cases

First, cases will be randomly allocated to the Permanent Chambers. The European Chief Prosecutor will however be able to decide to deviate from this random allocation where necessary for the proper functioning of the Office (Art. 10(1)).

Then, the allocation of investigations and prosecutions will be performed by the Permanent Chambers. They will designate the relevant Member State for each investigation and prosecution, be responsible for directing and monitoring investigations and prosecutions conducted in the Member States, and coordinate investigations and prosecutions in cross-border cases (Art. 10(2)). To these ends, the most meaningful task of the Permanent Chambers is to give instructions to EDPs (Art. 10(4)). They will be in charge of instructing an EDP to initiate an investigation (Art. 10(4) lit. a)), and they will also decide whether to bring cases to Court, thus choosing in which Member State to do so (Art. 10(3) lit. a)).

Furthermore, the Permanent Chambers will play an increased role under specific circumstances. They will choose which Member State a case should be allocated to in situations involving the jurisdiction of more than one Member State. The

rule set by Art. 26(4) of the Regulation is that a case should be “initiated and handled by a European Delegated Prosecutor from a Member State where the focus of the criminal activity is or, if several connected offences within the competence of the Office have been committed, the Member State where the bulk of the offences has been committed”. The Permanent Chambers will also be able to

- reallocate cases;
- merge or split cases;
- refer some cases to national authorities;
- dismiss cases (if need be).²⁰

2. The power to exercise the right of evocation

The EPPO will be able to take over cases initiated by national authorities, thanks to its right of evocation. The latter may be exercised by the EDP whose national authorities have initiated an investigation (Art. 27(6)). If an EDP decides not to exercise his/her right of evocation, he/she shall inform the competent Permanent Chamber through the European Prosecutor of his/her Member State. The Permanent Chamber will then take the final decision on whether to evoke the case or not (Art. 10(4) lit. b) and 27(6)).

Moreover, when an investigation into offences committed against the EU’s financial interests has already been initiated by national authorities, the latter will be required to inform the EPPO (Art. 24(2)). The Office will then decide whether to exercise its right of evocation. It will have to do so within five days, which can be extended by a reasoned decision taken by the European Chief Prosecutor for another maximum timeframe of five days (Art. 27(1)). The College may issue guidelines allowing EDPs to decide not to evoke a case if damage to the EU does not exceed € 100,000 and if the College sees no need to investigate or prosecute at the EU level (Art. 27(8)). When exercising the right of evocation, the EPPO shall consult with national authorities (Art. 27(4)). If done, the latter shall transfer the proceedings to the EPPO (Art. 27(5)). National authorities may have to take any urgent measures necessary to ensure the effectiveness of investigation and prosecution (Art. 27(2)).

The latter shows in particular that the approach chosen by the Regulation will require cooperation from national authorities. Such cooperation will mainly be established through the exchange of information and evidence. It will require trust and good will on the part of both parties in order to ensure a smooth and swift flow of information. Cooperation between the EPPO and national authorities will also contribute to the integrated nature of the EPPO as outlined above. This is expected from the Member States, in compliance with the principle of sincere cooperation in accordance with Art. 4(3) TEU.

3. The power regarding investigative measures

EDPs may either undertake investigative measures themselves or instruct competent authorities in the Member States to do so (Art. 28(1)). The latter possibility was taken over from the Commission’s proposal, although it is now specifically granted to EDPs and no longer to the EPPO as a whole. This power is characteristic for the integration of EDPs into the national judicial systems and should help ensure a smooth coordination between the EPPO and national authorities. It remains to be hoped that national authorities will fully cooperate with EDPs when implementing investigative measures.

To this end, the Regulation provides for a toolbox of investigative measures that will be available as minimum standards. They will not replace national investigative measures. Such measures include, for instance:

- the right to order or request the search of premises, means of transport, private homes, and computer systems;
- the right to obtain the production of any relevant object, document or stored computer data;
- the right to freeze proceeds of crime and assets; and
- the right to intercept electronic communications.²¹

These provisions on investigative measures represent a first step towards the adoption of harmonised procedural criminal rules at the EU level. Although they will only complement national measures and not replace them, the measures contained in this toolbox will allow the EPPO to carry out EU-wide investigations in an effective manner.

As regards investigative measures to be adopted in *cross-border cases*, the Regulation now provides for a new cooperation mechanism between EDPs. The EDP handling a case will be able to assign an investigative measure to another EDP in another Member State (so-called assisting European Delegated Prosecutor). Therefore, there will be no need to use mutual legal assistance nor mutual recognition instruments anymore across the Member States participating in enhanced cooperation. The use of investigative measures may, however, be subject to conditions and limitations imposed by national law (Art. 30(2) and (3)), and national law will still exclusively govern any measures not provided for in this list.

Should national procedural rules of the assisting EDP require a judicial authorisation prior to performing the required investigative measure, this EDP shall request the authorisation according to his/her national law. If such an authorization is required under the law of the EDP handling the case, however, he/she shall request an authorisation beforehand, then submit it together with the assignment of the investigative measure to the assisting EDP.

This mechanism shows the complexity of building a single judicial area in the EU. Despite the integrated approach provided for in the Regulation, national law still plays the essential role. Moreover, this mechanism seems to be more ambitious than the solution provided for in the Directive on the European Investigation Order.²² In the latter, national law can be invoked under certain circumstances in order to refuse the execution of a European Investigation Order.²³ National authorities are referred to as “issuing” and “executing” authorities instead of the “handling” and “assisting” EDPs. Thus, the wording of the Regulation shows a more integrated approach, implying more direct cooperation. When an EDP seeks the arrest or surrender of an individual in another Member State, he/she must however resort to a European Arrest Warrant.²⁴ There is no specific mechanism foreseen for the EPPO in respect of extradition.

IV. Conclusion

The creation of the EPPO can be considered one of the landmark projects of the Area of Freedom, Security and Justice. After years of negotiations within the Council, a hybrid architecture of the Office has taken shape. This is the result of the requirements put forward by the Member States, which thoroughly amended the original proposal of the Commission into

a more “sovereignty-friendly” direction. Indeed, such changes have unfortunately increased the complexity and probably the costs of the project.²⁵ I believe that the hybrid architecture of the EPPO will nevertheless enable better coordination between its central body and the national level. The powers granted to the EPPO (such as the right of evocation and the power to adopt investigative measures) will ensure an effective working environment and its ability to liaise with national authorities. The embedment of EDPs in national judicial systems will greatly contribute to this ability.

The final adoption of the Regulation should, in my view, pave the way for an enhanced protection of the EU’s financial interests. Hopefully, the EPPO will be able to start its work as soon as possible.²⁶ I believe that the EPPO will vastly remedy the shortcomings of the current EU anti-fraud mechanism and ensure an improved protection of the EU’s financial interests. One should also hope that its jurisdiction will soon be expanded to include other serious crimes, such as terrorism, as was recently advocated by both Commission President *Juncker*²⁷ and French President *Macron*.²⁸ Criminal organisations rely on international networks and have the ability to strike all EU Member States. Hence, the fight against major cross-border crimes (and especially terrorism) would greatly benefit from improved cooperation and from the EPPO’s ability to coordinate and monitor prosecutions.



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1 Mireille Delmas-Marty, John A.E. Vervaele, *The Implementation of the Corpus Juris in the Member States: Penal Provisions for the Protection of European Finances*, Intersentia, 2000. The *Corpus Juris* was first designed by Prof. Delmas-Marty in 1997. Mireille Delmas-Marty, *Corpus Juris introducing penal provisions for the purpose of the financial interests of the European Union*, *Economica*, 1997.

2 The possibility to resort to enhanced cooperation is provided for in Art. 86 TFEU if unanimity cannot be reached.

3 Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office (‘the EPPO’), *O.J. L* 283, 31.10. 2017, 1.

4 A. Met-Domestici, “The Reform of the EU’s Anti-Corruption Mechanism”, (2012) *eu crim*, 25.

5 See Art 11(6) Regulation 883/2013.

6 See M. Coninx, “The European Commission’s Legislative Proposal: An Overview of its Main Characteristics”, in: L.H. Erkelens, A.W.H. Meij and M. Pawlik (eds.), *The European Public Prosecutor’s Office – An Extended Arm or a Two-Headed Dragon*, 2015, p. 21; L. Kuhl, *The Initiative for a*

Directive on the Protection of the EU’s Financial Interests by Substantive Criminal Law, (2012) *eu crim*, 63.

7 Cf. K. Ligeti and A. Weyembergh, “The European Public Prosecutor’s Office: Certain Constitutional Issues”, in: L.H. Erkelens, A.W.H. Meij and M. Pawlik (eds.), *op. cit.* (n. 6), p. 53, 59.

8 Treaty of Lisbon, Protocol n° 2 on the application of the principles of subsidiarity and proportionality, *O.J. C* 83, 30 March 2010, 206.

9 Communication from the Commission to the European Parliament, the Council and the National Parliaments on the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office with regard to the principle of subsidiarity, in accordance with Protocol n° 2, COM 2013 (851) final, Chapter 2.

10 As provided for in Art. 5 TEU. This procedure allows national parliaments to assess compliance with the subsidiarity principles of EU legislative proposals. Such a procedure may lead the Commission to reassess its proposal or even, under strict conditions, block its adoption – which would amount to a “red card.” It was only the second time that a “yellow card” had been adopted. In the case of proposals pertaining to the Area of Freedom, Security and Justice, only 14 reasoned opinions are required to trigger the “yellow card” procedure, i.e., to force the Commission to reassess its proposal. See also the Commission’s proposal, Explanatory memorandum 3.1 and recital 6 as well as the article of F. Giuffrida, in this issue.

11 European Parliament, Resolution of 5 October 2016 on the European Public Prosecutor’s Office and Eurojust, 2016/2750 (see also T. Wahl, (2016) *eu crim*, 126).

12 European Parliament, Resolution 2016/2750, F. 1.

13 European Parliament, Resolution 2016/2750, F. 2.

14 Directive (EU) 2017/1361 of the European Parliament and of the Council of 5 July 2017 on the Fight against Fraud to the EU’s Financial Interests by Means of Criminal Law, *O.J. L* 198, 28.7.2017, 29.

15 European Commission, Proposal for a Council Regulation on the Establishment of the European Public Prosecutor's Office, 17 July 2013, COM(2013) 534 final.

16 COM(2013) 534 final, Art. 11(4).

17 Regulation (EU) 2017/1939, Recital 12. For the compliance with the subsidiarity principle, see also the article of F. Giuffrida in this issue.

18 France, for instance, has already created its national equivalent of the EPPO, namely the *Parquet financier*. He is responsible for prosecuting cases involving offences such as major economic crimes, complex tax fraud, organized tax fraud, corruption, and money laundering. According to the French law of 6 December 2013, the *Parquet financier* became operational on 1 January 2014. It is headed by one chief prosecutor who is assisted by deputy financial prosecutors. One might well wonder whether the members of the *Parquet financier* will also act as European Delegated Prosecutors once the EPPO has been created.

19 Of course, this will not be the case in Member States that will not take part in the EPPO. In those Member States, national prosecuting authorities will still enjoy a classical relationship with OLAF. The anti-fraud office will still have to forward its investigation reports to national prosecuting authorities, the latter being entirely free to decide whether to prosecute or not. According to the new OLAF regulation, national authorities are however required to inform OLAF of any actions they have taken in the wake of its reports (Art. 11 (6) Regulation 883/2013).

20 See Arts. 10(4e), 26(5a), 26(5b), 10 (3d), and 10(3b).

21 Art. 30(1).

22 Directive 2011/41 EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in Criminal Matters, *O.J.* L 130, 1.5.2014, 1.

23 Several grounds for refusal are provided for in Art. 11 of the EIO Directive.

24 Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States, *O.J.* L 190, 18 July 2002, 1.

25 In this regard, the European Parliament has asked the Commission to reassess the cost of the amended proposal. European Parliament, Resolution of 5 October 2016 on the European Public Prosecutor's Office and Eurojust, 2016/2750, Para. 8.

26 The EPPO shall start its activities on a date which will be set by the Commission, on a proposal by the European Chief Prosecutor. According to the Regulation, it cannot be set earlier than three years after the entry into force of the regulation, i.e. 1 November 2020 (Art. 120).

27 https://ec.europa.eu/commission/state-union-2017_en. See also news section of this issue under "European Public Prosecutor's Office".

28 <http://www.elysee.fr/declarations/article/initiative-pour-l-europe-discours-d-emmanuel-macron-pour-une-europe-souveraine-unie-democratique/>. See also news section of this issue under "European Public Prosecutor's Office".

Cross-Border Crimes and the European Public Prosecutor's Office

Fabio Giuffrida*

I. Introduction

On the 5th of October 2017, the European Parliament gave its consent to the draft Council Regulation establishing the European Public Prosecutor's Office (EPPO), bringing to an end the legislative procedure initiated in 2013. Published in the Official Journal at the end of October 2017,¹ the final text of the Regulation had been previously agreed upon by 20 Member States – within the framework of an enhanced cooperation established in April 2017² – in the Justice and Home Affairs Council of 8 June 2017.³ In the Commission press release of the same date, the answer to the question why there is need for a European Public Prosecutor was as follows: "Every year at least 50 billion euro of revenues from VAT are lost [...] through *cross-border fraud*. *Transnational* organised crime is making billions in profit every year [...] National prosecutors' tools to fight large-scale *cross-border* financial crime are limited. The new EU prosecutor will conduct swift investigations *across Europe* [...]."⁴ The mission of the EPPO is thus intertwined with crimes affecting the financial interests of the

EU (so-called PIF offences), especially those having a cross-border dimension; yet this does not capture the whole picture, since the EPPO will also be competent for PIF offences concerning one Member State only.

In addition, Art. 86(4) TFEU provides that the European Council – after consulting the Commission and obtaining the consent of Parliament – can adopt a unanimous decision widening the competence of the EPPO to include "serious crimes affecting more than one Member State." Although (at least) three years will be necessary before the EPPO can start its activities,⁵ the extension of its mandate to cross-border cases of terrorism has already received support in political and academic circles.⁶ In the recent 2017 State of Union address, the President of the European Commission forecast that the Commission would table a Communication on the matter in September 2018.⁷ Likewise, in his speech at the Sorbonne University in late September 2017, French President Emmanuel Macron included the extension of the EPPO's competence to transnational terrorism among his proposals for relaunching the EU.⁸

Against this backdrop, this contribution aims to shed light on some issues concerning the cross-border cases (already or potentially) falling within the competence of the EPPO. The notion of “cross-border cases” – them being PIF offences or other offences – encompasses at least three scenarios:

- i) Cases involving two or more Member States *participating in the EPPO*, including cases where the criminal activity is carried out in a single country, but the suspect has a habitual residence in, or is a national of, another Member State;⁹
- ii) Cases involving two or more Member States, one of which is *not part of enhanced cooperation*;
- iii) Cases involving at least one *third country*.

In the scenarios under ii) and iii), the controversial topic is how to regulate the relations of the EPPO with the competent authorities of non-participating Member States or third countries. In contrast, the scenario under i) brings to the fore issues concerning the efficient handling of investigations and prosecutions throughout the EU and, more precisely, throughout the legal systems of Member States participating in the EPPO.

This article focuses on the latter scenario and discusses cross-border cases from two different perspectives.¹⁰ *First*, the role of transnational cases within the architecture of the EPPO will be analysed from a constitutional point of view (II). The competence of the EPPO in cross-border cases will be discussed in more detail in the context of the principle of subsidiarity (II.1), followed by some remarks on the rule of voting set out in Art. 86(4) TFEU (II.2). *Second*, a criminal law perspective will be adopted. The analysis will focus on the choice of forum, assessing the compatibility of the Regulation with the principle of legality and the right of defence (III).

II. A Constitutional Perspective: The Mandate of the EPPO between Subsidiarity and Enhanced Cooperation

1. Cross-border cases and the principle of subsidiarity

As reflected in the above-mentioned Commission press release, the compliance of the EPPO with the principle of subsidiarity is motivated inter alia by the allegedly transnational nature of PIF offences, which are not adequately tackled by Member States and EU bodies (Eurojust, Europol, and OLAF).¹¹ Among the elements to be taken into account in the assessment of this principle, the Protocol to the Treaty of Amsterdam on subsidiarity listed the occurrence of “transnational aspects which cannot be satisfactorily regulated by action by Member States.”¹² Although the guidelines provided in that Protocol have not been restated in Protocol No. 2 to the Lisbon Treaty, the Commission declared that it will continue to use them in the evaluation of the principle of subsidiarity,¹³ as confirmed in the recent “Better Regulation Toolbox.”¹⁴ The establishment

of a European body can thus be an appropriate solution to the deficiencies of national investigations into cross-border fraud. Convincing at first glance, this conclusion has been criticised for a number of reasons, and several national parliaments submitted that the Commission’s Proposal for a Council Regulation on the EPPO did violate the principle of subsidiarity.¹⁵ The Commission rejected these objections and maintained the Proposal, yet doubts over compliance of the Regulation with the principle at stake have not been entirely dispelled.¹⁶

First, although the Commission argues that a huge amount of EU money is lost annually or diverted because of fraud, the quantification of similar losses is not – and can never – be precise: “by definition fraudulent activities are meant to remain in the shadows,”¹⁷ and this holds true both for domestic and cross-border cases. Occasional estimates represent only the “tip of the iceberg” of the real phenomenon.¹⁸ For instance, the EPPO Impact Assessment estimates that around €3 billion per year “could be at risk from fraud.”¹⁹ In the light of such an uncertainty over the true scale of the problem, one could wonder whether other solutions by which to cope with fraud against the EU budget would have been more appropriate, rather than opting for the establishment of a new body.

Second, the EPPO is supposed to overcome the alleged deficiencies of the existing instruments and bodies of judicial cooperation at EU level. However, the 2010 Stockholm Programme had envisaged a “step-by-step approach:”²⁰ the implementation of the new Council Decision on Eurojust had to be assessed first, whereas it would only have been possible to discuss the available options to enhance the existing legal landscape at a second stage, including the creation of the EPPO.²¹ The Commission adopted a “parallel approach” instead,²² i.e., it put forward its Proposal for the EPPO Regulation together with a Proposal for a Regulation on Eurojust without waiting for the conclusion of the evaluation of the implementation of the 2009 Eurojust Council Decision.²³

Furthermore, emphasis on the transnational dimension of PIF offences risks overshadowing the fact that the EPPO is competent in cases having an exclusively national dimension as well. It is claimed that a significant part of the EU’s losses are actually due to (minor) fraud committed within national borders and for limited amounts of money.²⁴ Most EU funds are indeed given to European citizens and legal entities by national bodies through national procedures on behalf of the EU.²⁵ The competence of the EPPO over purely national cases was one of the points touched upon by some national Parliaments,²⁶ which did not see any real added value in creating a European body (also) dealing with domestic cases. The Commission dismissed the argument, pointing in particular to the “intrinsic Union dimension” of PIF offences.²⁷

This shows that the EPPO and, more generally, the PIF sector are typical examples of a harmonious – but politically sensitive – combination of the two rationales behind subsidiarity. As noted by Wieczorek, subsidiarity is traditionally thought of as a principle to select the sectors in which EU action is more efficient than that of Member States; in the field of criminal justice, the typical example is the fight against cross-border criminality.²⁸ However, the Union has recently intervened in this and other fields also on the basis of normative assumptions, i.e., not because of the cross-border dimension of given phenomena but in light of its “willingness to express its moral position on a particularly important subject” or the “need to enforce its own norms,”²⁹ such as those on the protection of the Union budget.

The PIF sector thus conflates both aspects of the principle of subsidiarity. On the one hand, transnational PIF offences are allegedly not adequately tackled by Member States; their scope hence calls for an intervention from the EU. The cross-border nature of PIF offences sits very well with the traditional interpretation of subsidiarity of the Union’s action in criminal law matters, yet it is only one side of the coin. On the other hand, in line with the emerging normative facet of the principle of subsidiarity, the remit of the EPPO also includes national cases, since the interest at stake (the Union budget) is purely and inherently European. It is precisely for the latter reason that the question remains as to whether the creation of a European Public Prosecutor’s Office by only 20 Member States is truly compliant with the principle of subsidiarity. In fact, if the EPPO aims at establishing “a coherent European system for the investigation and prosecution”³⁰ of PIF offences and at protecting an EU interest par excellence, it is “paradoxical”³¹ that the Office is composed of less than three quarters of EU Member States.³² Nevertheless, in terms of Realpolitik, the setting up of the EPPO is a historical achievement on the part of the European Union and, in the future, the Office could also gain consensus among the non-participating Member States.

In light of the foregoing, the (potential) competence of the EPPO for serious cross-border cases beyond the PIF sector, as envisaged by Art. 86(4) TFEU, should be less controversial from the subsidiarity perspective. The extension of the mandate of the Office could not cover purely domestic crimes, as in the case of PIF offences; once the link with the PIF sector is lost, the mission of the EPPO would be justified by the traditional, purely “efficiency-based rationale,” rather than the emerging “normative” one.³³ These “two very different embryos”³⁴ of Art. 86 TFEU can be explained by bearing in mind that this provision is included in the Title of the Treaty concerning the Area of Freedom, Security and Justice, i.e., an area in which EU action has been endorsed and gradually enhanced because of the cross-border dimension of the phenom-

ena concerned, such as transnational criminality.³⁵ Thus, while it is still being debated whether (most) PIF offences have a transnational dimension that justifies the establishment of the EPPO, this issue would not arise if the EPPO were to be given powers to fight serious cross-border crime. However, although the extension of the powers of the EPPO in accordance with Art. 86(4) TFEU would probably be less contentious from a constitutional perspective as far as the subsidiarity principle is concerned, it was never a consideration in the negotiations on the Regulation. It is self-evident that such an extension would signify a bold step forward in the direction of a “federal” Europe, one in which a European prosecution service would counter crimes affecting common security interests. The time for this is probably not ripe yet, but things seem to be slowly changing.

In sum, it is understandable why the Commission – in public statements and official documents – plays both cards: the cross-border dimension of PIF offences and their European nature. On the one hand, the supranational essence of the protected interest justifies the establishment of the EPPO. Still, when a given PIF crime does not have any link with other Member States, the competence of the EPPO to investigate and prosecute such a crime turns out to be a contentious issue, since the powers of the Office represent a considerable intervention into national sovereignty. On the other hand, the argument involving the transnational scale of PIF offences is rather convincing and well entrenched in EU constitutional law, but some have cast doubts as to its validity in the PIF sector. It is somehow even ironic that the competence of the EPPO for VAT carousel fraud, i.e., the PIF offence with a cross-border dimension by definition, has been limited to the most serious cases in which the total damage caused by such fraud is at least €10 million.³⁶

Moreover, the combination of these two factors is convincing in some respects; a single EU body competent for PIF offences would be in an ideal position to detect, for instance, possible links among national cases. These links would, admittedly, not be easy to discover if, as is sometimes the case, national authorities focus only on the domestic side of a given case and are reluctant to extend their investigations to transnational aspects.³⁷ For the very same reason, the commitment of the Commission to launch a debate on the extension of the EPPO’s competence in serious cross-border cases next year already is to be welcomed. Such an extension would be in line with the traditional interpretation of the principle of subsidiarity in EU criminal law and will leave untouched the competences of Member States in purely national cases. Nevertheless, it would represent a further, if not groundbreaking, example of increasing integration among national criminal justice systems in the name of common needs and interests. Hence, the Treaty pro-

vides that such a bold move needs to be taken by the European Council and by means of a unanimous vote, i.e., including Member States not participating in enhanced cooperation. As will be argued below, however, Art. 86(4) TFEU is not without controversy.

2. Cross-border cases beyond the PIF sector: the question of voting

The principle according to which enhanced cooperation shall be open to the participation of other Member States (Art. 328(1) TFEU) and the political sensitivity of the decision to enlarge the mandate of the EPPO beyond the PIF sector justify the choice by the drafters of the Treaty to leave such a decision in the hands of the European Council, which shall act unanimously. Yet, the issue remains controversial. Empowering non-participating Member States to veto the adoption of the decision provided for by Art. 86(4) TFEU jeopardises the other overarching principles of enhanced cooperation, namely that only Member States participating in enhanced cooperation can decide on how such a cooperation shall be developed and that its implementation shall not be impeded by non-participating Member States (Art. 327 TFEU). In *Spain and Italy v. Council*, concerning enhanced cooperation in the field of the unitary patent protection, the ECJ clarified as follows: “While it is, admittedly, essential for enhanced cooperation not to lead to the adoption of measures that might prevent the non-participating Member States from exercising their competences and rights or shouldering their obligations, it is, in contrast, permissible for those taking part in this cooperation to prescribe rules with which those non-participating States would not agree if they did take part in it.”³⁸ The Court added that the adoption of such rules “does not render ineffective the opportunity for non-participating Member States of joining in the enhanced cooperation. As provided by the first paragraph of Article 328(1) TFEU, participation is subject to the condition of compliance with the acts already adopted by those Member States that have taken part in that cooperation since it began.”³⁹ In other words, non-participating Member States cannot steer or impair enhanced cooperation from the outside. If and when they decide to take part in it, they will have to accept what the “insiders” have already decided.

Nevertheless, Art. 86(4) TFEU is rather clear and does not seem to leave room for alternative interpretations, such as that of reading this provision as requiring the unanimity of all and only the Member States participating in enhanced cooperation. This is currently provided for by the Treaty in relation to the voting system of the Council within the framework of enhanced cooperation (Art. 330 TFEU). In principle, the application of this rule to the European Council’s decision regu-

lated by Art. 86(4) TFEU would not be so surprising. After all, the European Council, which finally “joined the fold of formal Union institutions after Lisbon,”⁴⁰ would not decide by consensus but rather by unanimity, i.e., with a vote.⁴¹ However, since alternative readings do not seem feasible, the only way to fully comply with the above-mentioned principles concerning enhanced cooperation would be to amend Art. 86(4) TFEU, in order to allow only participating Member States to take part in the decision on the competence of the EPPO.

A further argument can be made on the basis of Art. 22(1) of the EPPO Regulation, which establishes the mandate of the Office mostly by referring to the PIF Directive. The Directive applies inter alia to VAT fraud but only when the offence is connected with the territory of two or more Member States and involves a total damage of at least €10 million.⁴² These requirements have also been copy-pasted into Art. 22(1) of the EPPO Regulation. The consequence is that a modification of this provision – and not of the Directive – will be necessary if Member States decide to extend (or reduce) the mandate of the EPPO for VAT fraud. This is due to the concerns of some Member States that an extension of the EPPO’s competence to a broader range of VAT fraud – in particular by lowering the above-mentioned threshold (€10 million) or removing the criterion of transnationality – would be indirectly obtained through an amendment of the PIF Directive. The nub of the issue is that, whereas the EPPO has been set up by a unanimous decision of 20 Member States and any amendment of the Regulation requires their unanimity as well, the PIF Directive can be modified by means of a decision adopted by a qualified majority of all Member States, including those not participating in the EPPO.⁴³

Hence, if it is reasonable that the competence of the Office regarding VAT fraud can be changed only by the unanimous consent of Member States participating in the EPPO, it would likewise be reasonable to apply the same regime to the decision provided for by Art. 86(4) TFEU.

III. A Criminal Law Perspective: The Choice of Forum

The competence of the EPPO in cross-border cases spotlights the issue of the choice of forum. The main rules of the Regulation on the matter are the following:

- a) *Investigations* shall be initiated in the Member State where “the focus of the criminal activity is or [...] where the bulk of the offences has been committed” (Art. 26(4) of the EPPO Regulation);
- b) Deviations from the principle of territoriality are admitted, since the Permanent Chamber (PC) can instruct the European Delegated Prosecutor (EDP) of a different Member State to

initiate the investigations on the basis of the criteria listed in Art. 26(4), namely, in hierarchical order: i) the place of habitual residence of the suspect; ii) his/her nationality; and iii) the country that has suffered the main financial damage. On the basis of these criteria, the PCs can also reallocate the case to an EDP in another Member State at a later time, i.e., *during the investigations*, if this is “in the general interest of justice” (Art. 26(5));

c) In principle, the case shall be brought to *prosecution* in the same Member State of the EDP who handles the cases. On the basis of the criteria mentioned in under b), the PC can decide to initiate the prosecution before the courts of another Member State that is equally competent, if there are “sufficiently justified grounds” (Art. 36(3)).

These rules aim to balance the need to leave the EPPO a minimum of flexibility with the guarantees attached to the right of defence (Arts. 48(2) CFR and 6(3) ECHR) and the principle of legality (Arts. 49(1) CFR and 7 ECHR). In essence, the latter principle stipulates, according to Luchtman, that “certain issues may only be dealt with by a competent lawmaker. By doing so, effective safeguards can be provided against arbitrary prosecution, conviction and punishment.”⁴⁴ Thus, in line with the case law of the ECtHR, not only shall substantive criminal legislation be accessible and its effects foreseeable, but “procedural rules have to comply with the principle of legal certainty” as well.⁴⁵ Against this premise, it should be noted that – in comparison with the much vaguer provisions of the Commission’s Proposal – the final text of the Regulation omits contentious criteria, such as the location of evidence, and instead introduces a hierarchical order for the criteria listed in Art. 26(4). *Prima facie*, this satisfies the required legal certainty that shall underpin the activities of the EPPO.⁴⁶

Some concerns arise, however, upon closer inspection. Assuming that investigations are regularly initiated in the Member State of the *locus commissi delicti* (State A), this means that the investigative measures are adopted, and can be challenged by the suspect (X) in that Member State. Since, in principle, the trial would also take place in A, X can organise his/her defence strategy accordingly. If, during the investigations, the case is then allocated to the EDP from the Member State of the habitual residence of X (say, State B), such a strategy could become useless, and the defendant would then have to adjust it to the rules of B. Even worse, the case could in fact be brought to prosecution in a different Member State altogether (say State C, the country of which X is a national): in this “patchwork proceeding,”⁴⁷ the accused would have no chance to adopt any effective line of defence. As Panzavolta puts it, “[t]he key word here is foreseeability. To choose jurisdiction means also to choose rules and context. [...] It is a matter of organising and preparing the defence effectively, both in

practical and legal terms.”⁴⁸ Thus, these likely violations of the principle of legality are intertwined with, or may rather result in, breaches of the right of defence, if not of fair trial: in the scenario sketched above, the allocation of jurisdiction to a Member State different from that in which investigations were initiated would realistically bring about a substantial disadvantage to the defendant vis-à-vis the EPPO.⁴⁹

In sum, the foreseeability in abstracto of the legal system in which investigations and prosecutions will take place is not enough; once the EPPO has initiated its activities in concreto in a Member State, relevant consequences follow, and the suspect is called upon to make choices in order to better defend him-/herself. Hence, an interpretation of the rules at stake in conformity with the above-mentioned rights and principles would imply that, once the suspect becomes aware of investigations concerning him/her, the EPPO shall refrain from reallocating the investigations or launching the prosecution in another Member State, unless duly justified by a case of extraordinary circumstances. This is what the guidelines issued by Eurojust already suggest: the choice of forum shall be made “as early as possible in the investigation or prosecution process” and “[w]hen an investigation is already in an advanced stage in one jurisdiction, transferring the case to another jurisdiction might not be appropriate.”⁵⁰

Ultimately, the Regulation does not provide for any judicial control at the European level as regards both the choice of the Member State where to initiate (or reallocate) the investigations and that of the Member State where the trial shall take place. Focusing on the latter, only national courts can scrutinise the choice of forum made by the EPPO.⁵¹ Some authors have defended this, since national judiciary would be in a better position to take a swift decision on the matter compared to the ECJ, would have access to the case file, and could resort to the ECJ pursuant to Art. 267 TFEU in any case.⁵²

A number of arguments can, however, be marshalled for an opposite conclusion. First, the decision on the choice of forum is taken at the EU level of the EPPO (the Permanent Chamber), it follows criteria set out by EU rules (the Regulation), and it should not even raise concerns in terms of confidentiality, since the investigations are over. Thus, judicial control at the EU level would be appropriate. True, a quick decision on the conflict of jurisdiction is necessary, especially if the suspect is being deprived of his/her liberty, but the ECJ has already shown itself to be able to decide within a short time in similar circumstances.⁵³

Moreover, as already pointed out in the 2001 Commission’s Green Paper, if control over the choice of forum is left to national courts, “there could be a few cases of declined jurisdic-

tion and possibly even of negative conflicts of jurisdiction.”⁵⁴ Going back to the previous example, if investigations are initiated in State A and later moved to State B, and the case is finally brought to prosecution in State C, the suspect can challenge the jurisdiction of C before the courts of this Member State. Assuming that the courts of C reject their jurisdiction because the PC has not correctly applied the Regulation, the PC could lodge an appeal against the decision, if national law so provides. If the appeal fails, or if the EPPO considers it more appropriate to initiate the prosecution in another Member State, say B, the case can be brought before courts in B. Here again, the courts could refuse their jurisdiction: assuming they decline their jurisdiction as well, a negative conflict of jurisdiction therefore arises, as foreseen by the Commission’s Green Paper. As things stand, this conflict could not be settled at the European level by a European court. The only way to avoid a stalemate would be for national authorities to find an agreement pursuant to the 2009 Framework Decision on conflicts of jurisdiction⁵⁵ and/or involving Eurojust.

In conclusion, the Regulation sets out clear criteria for the EPPO to follow in the choice of forum. In order to guarantee a stronger protection of the rights of suspected persons, these rules may be interpreted as progressively limiting the powers of the EPPO to switch jurisdiction as the investigations proceed. The lack of judicial review of the choice of forum at the EU level is deplorable and could potentially lead to unfortunate deadlocks.

IV. Conclusion

After four years of negotiations, the EPPO Regulation was finalised in October 2017. When the added value of the EPPO is discussed, emphasis is often placed on the need to establish a supranational prosecuting authority to cope with cross-border cases of fraud. This paper has demonstrated that such a competence over transnational PIF offences sits very well with the traditional interpretation of the principle of subsidiarity in EU law. However, the Commission has justified the establishment of the EPPO also in light of what has been identified as the – emerging – normative facet of the principle of subsidiarity. In other words, the EPPO aims at the protection of an inherently European interest (the budget of the Union) and, as a consequence, it is also entrusted with investigations and prosecutions concerning purely domestic cases of PIF offences. Despite this two-fold justification, the assessment of the real need to establish the EPPO has been one of the sticking points of the negotiations on the Regulation. The choice of a number of Member States not to join the Office – at least for the time being – confirms that doubts have not been entirely dispelled.

Art. 86(4) TFEU also provides for a procedure to broaden the mandate of the EPPO in such a way as to include serious cross-border crimes. Such an extension would be in line with the traditional interpretation of the principle of subsidiarity in EU criminal law and would not encroach upon the competences of Member States on purely national cases. Since it implies a further integration into national criminal justice systems, it is the European Council that shall make this highly sensitive choice. Especially in times when action against some criminal threats would benefit from a European response, it is regrettable, if not incompatible with other EU principles, that the European Council needs to decide by unanimity, since non-participating Member States are basically allowed to impair further development of enhanced cooperation.

Finally, note should be taken that cross-border PIF offences raise a number of issues when it comes to the choice of forum. In particular, once the EPPO has initiated its activities in a Member State, due consideration must be paid to the right of defence and the right to a fair trial, both of which are intertwined with the principle of legality in this context. In other words, because the suspect has the right to organise his/her defence, the EPPO shall use the flexibility it enjoys in the choice of forum only in extreme and well-justified instances, especially if the suspect has already become aware of investigations concerning offences allegedly committed by him/her. Ultimately, it is definitely positive that the Regulation lists hierarchical criteria for the Office to follow in the choice of forum, yet some concerns continue to emerge, not least because judicial control over such a choice would be necessary at the EU level.

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1 Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office (‘the EPPO’), *O.J.* L 283, 31 October 2017.

2 See Council doc. 8027/17 of 5 April 2017.

3 Council press release, “20 member states agree on details on creating the European Public Prosecutor’s office (EPPO)”, 8 June 2017.

4 Commission press release, “Commission welcomes decision of 20 Member States to establish the European Public Prosecutor’s Office”, 8 June 2017. Emphasis added.

5 Commission Fact Sheet, “Frequently Asked Questions on the European Public Prosecutor’s Office”, 8 June 2017. See also Recital 121 and Art. 106(2) of the EPPO Regulation.

6 In particular, this has been and still is the stance of the Italian Minister of Justice Andrea Orlando: see “Guardasigilli Orlando: estendere la Procura Europea anche ai reati di terrorismo”, (2017) *Diritto e Giustizia*. In the literature, see many of the contributions in G. Grasso *et al.* (eds.), *Le sfide dell’attuazione di una Procura europea: definizione di regole comuni e loro impatto sugli ordinamenti interni*, 2013 and especially those of: R. Sicurella, “Il diritto penale applicabile dalla Procura europea: diritto penale sovranazionale o diritto nazionale ‘armonizzato’? Le questioni in

gioco”, p. 7, 34–36; D. Flore, “A European Public Prosecutor’s Office: guidelines for the European agenda”, p. 705, 707–709; G. Grasso, “Relazione di sintesi”, p. 715, 766–768.

7 Commission, “State of the Union 2017. Roadmap for a more united, stronger and more democratic Union”, 13 September 2017.

8 “Les principales propositions d’Emmanuel Macron pour relancer le projet européen” *Le Monde*, 27 September 2017 <http://www.lemonde.fr/europe/article/2017/09/26/les-principales-propositions-d-emmanuel-macron-pour-relancer-le-projet-europeen_5191799_3214.html> (accessed 8 November 2017).

9 Habitual residence and nationality of the suspect are two criteria to be considered in the choice of forum by the EPPO. See section III.

10 For some remarks on the other scenarios, as well as for further considerations on a previous version of the Regulation (largely similar to the final text), see F. Giuffrida, “The European Public Prosecutor’s Office: King without kingdom?”, CEPS Research Report No 2017/03 <<https://www.ceps.eu/publications/european-public-prosecutor%E2%80%99s-office-king-without-kingdom>> (accessed 8 November 2017).

11 Commission, Explanatory Memorandum to the “Proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office”, COM(2013) 534 final, pp. 2–7.

12 Protocol on the application of the principles of subsidiarity and proportionality, *O.J. C* 340, 10 November 1997, 105.

13 Report from the Commission on Subsidiarity and Proportionality, COM(2011)344 final, p. 2. See I. Wieczorek, “The Principle of Subsidiarity in EU Criminal Law”, in: A. Weyembergh and C. Brière (eds.), *The Needed Balances in EU Criminal Law. Past, Present and Future*, forthcoming.

14 Commission, “Better Regulation ‘Toolbox’”, SWD(2015) 111 final.

15 See more in F. Giuffrida, (2017) *op. cit.* n. 11, pp. 4ff. For an analysis of the different opinions of national parliaments, see I. Wieczorek, “The EPPO Draft Regulation Passes the First Subsidiarity Test: An Analysis and Interpretation of the European Commission’s Hasty Approach to National Parliaments’ Subsidiarity Arguments”, (2015) 16 *German Law Journal*, 1247, 1252ff.

16 Communication from the Commission to the European Parliament, the Council and the national parliaments “on the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office with regard to the principle of subsidiarity, in accordance with Protocol No 2”, COM(2013) 851 final. For some remarks on the Communication, see V. Mitsilegas, *EU Criminal Law after Lisbon. Rights, Trust and the Transformation of Justice in Europe*, 2016, pp. 40–44.

17 H. Xanthaki, “What is EU fraud? And can OLAF really combat it?”, (2010) 17 *Journal of Financial Crime* 133, 133.

18 See, *inter alia*, A. Williams, “Fighting fraud in the EU: a note on icebergs and evidence”, (2013) 14 *ERA Forum*, 227, 228.

19 Commission, “Staff Working Document. Impact Assessment Accompanying the Proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office”, SWD(2013) 274 final, p. 4.

20 P. Jeney, “The future of Eurojust”, Study for the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs, 2012, p. 133. See: European Council, “The Stockholm Programme: an open and secure Europe serving and protecting citizens”, *O.J. C* 115, 4.5.2010, p. 13.

21 P. Jeney, (2012) *op. cit.* (previous n.), pp. 132–133.

22 *Ibid.*, p. 133.

23 In 2011, the Council Working Party on General Matters including Evaluation (GENVAL) decided to devote the sixth round of mutual evaluation to the Member States’ implementation of the Council Decisions on Eurojust and on the European Judicial Network. The final report of this round of evaluation was published in December 2014 (Council doc. 14536/2/14 of 2 December 2014), almost a year and half after the Commission’s Proposals for a Council Regulation on the EPPO and for a Regulation of the European Parliament and the Council on Eurojust (COM(2013) 535 final) were issued.

24 W. Tupman, “Keeping under the radar: watch out for the ‘Smurfs’”, (2012) 17 *Journal of Financial Crime*, 152, 155. See also A. Williams, (2013) *ERA Forum*, *op. cit.* (n. 19), 227, 231–232; P. Asp, “Jeopardy on European Level – What is the Question to which the Answer is the EPPO?”, in: P. Asp (ed.), *The European Public Prosecutor’s Office. Legal and Criminal Policy Perspectives*, 2015, p. 51, 62–63.

25 See, *inter alia*, B. Quirke, “EU Fraud: institutional and legal competence”, (2009) 51 *Crime, Law & Social Change*, 531, 532; A. Williams, (2013)

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26 For instance, see the opinions of the Czech Senate (Council doc. 16030/1/13 of 16 November 2013, p. 3) and of the Romanian Chamber of Deputies (available at <<http://www.ipex.eu/IPEXL-WEB/home/home.do>> accessed 8 November 2017). See also I. Wieczorek, (2015) 16 *German Law Journal*, *op. cit.* (n. 16), 1261–1263.

27 COM(2013) 851 final, *op. cit.* (n. 17), p. 11.

28 I. Wieczorek, “The Principle of Subsidiarity in EU Criminal Law”, *op. cit.* (n. 16).

29 *Ibid.*

30 COM(2013) 534 final, *op. cit.* (n. 12), p. 5. Emphasis added.

31 A. Weyembergh and C. Brière, “Towards a European Public Prosecutor’s Office”, Study for the LIBE Committee, 2016, p. 46.

32 See also, among the many, H. Labayle, “Mise en perspective”, in: P. Ghaleh Marzban (ed.), *Quelles perspectives pour un Ministère Public Européen? Protéger les intérêts financiers et fondamentaux de l’Union*, 2010, p. 49, 50; A. Suominen, “The Functionality of the EPPO”, in: P. Asp (ed.), *op. cit.* (n. 25), p. 88, 104–109; I. Wieczorek, (2015) 16 *German Law Journal*, *op. cit.* (n. 16), 1247, 1260–1261.

33 I. Wieczorek, “The Principle of Subsidiarity in EU Criminal Law”, *op. cit.* (n. 14).

34 M. Wade, “A European public prosecutor: potential and pitfalls”, (2013) 59 *Crime, Law & Social Change*, 439, 443. See also K. Ligeti, “Approximation of substantive criminal law and the establishment of the European Public Prosecutor’s Office”, in: F. Galli and A. Weyembergh (eds.), *Approximation of Substantive Criminal Law in the EU. The Way Forward*, 2013, p. 73, 75–76.

35 See V. Covolo, *op. cit.* (n. 26), pp. 667–668.

36 Art. 22(1) of the EPPO Regulation. See more in section II.2.

37 COM(2013) 851 final, *op. cit.* (n. 17), p. 11.

38 ECJ, 16 April 2013, Joined Cases C-274/11 and C-295/11, *Spain and Italy v. Council*, para. 82. Emphasis added.

39 *Ibid.*, para. 83.

40 A. Dashwood *et al.*, *European Union Law*, 6th ed., 2011, p. 4.

41 “The formal difference between ‘unanimity’ and ‘consensus’ is that unanimity is, or is supposed to be, the result of a vote” (J.J.E. Schutte, “Establishing Enhanced Cooperation Under Article 86 TFEU”, in: L.H. Erkelens *et al.* (eds.), *The European Public Prosecutor’s Office. An Extended Arm or a Two-Headed Dragon?*, 2015, p. 195, 200).

42 Art. 2(2) of the Directive (EU) 2017/1371 on the fight against fraud to the Union’s financial interests by means of criminal law, *O.J. L* 198, 28.7.2017, 29.

43 See Council doc. 8231/17 of 24 April 17. For further remarks on the competence of the EPPO and the PIF Directive, see G. Grasso and F. Giuffrida, “The material competence of the EPPO”, in: K. Ligeti and M. João Antunes (eds.), *The European Public Prosecutor’s Office at a Crossroads. ECLAN Symposium, Coimbra, 29-30 April 2017*, forthcoming.

44 M. Luchtman, “Towards a Transnational Application of the Legality Principle in the EU’s Area of Freedom, Security and Justice”, (2013) 9 *Utrecht Law Review*, 11, 13.

45 M. Böse, “Choice of Forum and Jurisdiction”, in: M. Luchtman (ed.), *Choice of Forum in Cooperation Against EU Financial Crime. Freedom, Security and Justice and the Protection of Specific EU-Interests*, 2013, p. 73, 80. See also F. Zimmermann, “Choice of Forum and Choice of Law under the Future Regulation on the Establishment of a European Public Prosecutor’s Office”, in: P. Asp (ed.), *op. cit.* (n. 25), p. 156, 161–162.

- 46 F. Faletti, "The European Public Prosecutor's Office and the Principle of Equality", (2017) *eu crim*, 25, 26. See also, A. Weyembergh and C. Brière, *op. cit.* (n. 32), p. 30.
- 47 "A Manifesto on European Criminal Procedure Law. European Criminal Policy Initiative", (2013) *Zeitschrift für Internationale Strafrechtsdogmatik*, 430, 435.
- 48 M. Panzavolta, "Choice of Forum and the Lawful Judge Concept", in: M. Luchtman (ed.), *op. cit.* (n. 46), p. 143, 160.
- 49 On equality of arms as a fundamental component of the right to a fair trial, see ECtHR, 22 June 2000, *Coëme and others v Belgium*, Appl. nos. 32492/96 *et al.*, para. 102.
- 50 Eurojust, "Guidelines for Deciding 'Which Jurisdiction Should Prosecute?'" , 2016, p. 3. Emphasis added.

- 51 See also M. Wasmeier, "The Choice of Forum by the European Public Prosecutor", in: L. H. Erkelens *et al.* (eds.), *op. cit.* (n. 42), p. 139, 153–157.
- 52 F. Faletti, (2017) *eu crim*, *op. cit.* (n. 47), 25, 26. For further remarks on the issue and references to authors supporting an opposite view, see F. Giuffrida and V. Mitsilegas, "Judicial review of the acts of the EPPO", in: K. Ligeti and M. João Antunes (eds.), *op. cit.* (n. 44), forthcoming.
- 53 See F. Giuffrida and V. Mitsilegas, *op. cit.* (previous n.), forthcoming.
- 54 Commission, "Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor", COM(2001) 715 final, p. 56.
- 55 Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, *O.J. L* 324, 15.12.2009, 42.

Repercussions of the Establishment of the EPPO via Enhanced Cooperation

EPPO's Added Value and the Possibility to Extend Its Competence

Dr. Costanza Di Francesco Maesa

I. Introduction

The establishment of the European Public Prosecutor's Office (hereinafter: the EPPO) is envisaged by Art. 86 TFEU in order to ensure the effective investigation and prosecution of the perpetrators of crimes affecting the financial interests of the Union (Art. 86(1) TFEU). According to Art. 86 TFEU, the competence of the EPPO may further be extended to serious crime having a cross-border dimension if a unanimous decision within the European Council is reached after obtaining the consent of the European Parliament (Art. 86(4) TFEU). A special legislative procedure is required even if an EPPO with a limited competence over crimes affecting the financial interests of the Union is established. The EPPO must be set up by means of a regulation approved unanimously within the Council¹ after having obtained the consent of the European Parliament. However, if a unanimous agreement on the proposal establishing the EPPO is not reached, Art. 86(1) subpara. 3 TFEU – as a means of breaking deadlock – envisages the possibility of establishing the EPPO by means of a procedure of enhanced cooperation by a group of at least nine Member States.

Thus, following the registered lack of unanimity in support of the proposal, those Member States participating in the EPPO enhanced cooperation finally adopted the regulation establish-

ing the EPPO on 12 October 2017.² The establishment of the EPPO through enhanced cooperation raises concerns about the added value of creating such a supranational prosecutorial authority. In particular, the question is whether an EPPO configured in this way will be able to achieve the objectives assigned to it. It must investigate and prosecute effectively, while respecting the fundamental rights of suspects and other persons involved in the proceedings initiated by it, offences against the financial interests of the Union, and the perpetrators of serious crime affecting more than one Member State (should its competence be ever extended to such crime).

Theoretically, the EPPO offers added value because, due to its direct power of investigation and prosecution, it will likely increase the number of prosecutions of crimes affecting the financial interests of the Union, increase the deterrent effect for potential criminals, and solve the "problems related to different applicable legal systems."³ The achievement of these objectives is nevertheless being questioned by those authors who highlight that "taking recourse to enhanced cooperation, however, would at any rate result in an unsatisfactory solution right from the start." In their view, "such an approach would – by definition – abandon the main advantage of creating an EPPO in the first place which is to investigate and prosecute throughout one single European legal area irrespective of any state borders."⁴

In order to address these issues, section II of the article explores whether the establishment of the EPPO via enhanced cooperation undermines the added value of the EPPO in combating crimes affecting the financial interests of the Union. Section III offers an evaluation of whether the establishment of the EPPO via enhanced cooperation makes it more difficult or even impossible to further extend the competence of the EPPO over terrorism-related crimes. Finally, some concluding remarks are made in the last section.

II. Relationship Between the EPPO and Non-Participating Member States – the “Added Value” Problem

A serious risk resulting from establishment of the EPPO through enhanced cooperation is that non-participating Member States (hereinafter: MS) unable or unwilling to cooperate with the EPPO’s requests for judicial cooperation could become a “safe haven” for the perpetrators of the offences falling within the competence of the EPPO.⁵ This could occur in the following situations:

- a) when offences falling within the EPPO’s mandate
 - i) are committed on the territory of non-participating MS or
 - ii) have a cross-border dimension and therefore have effect on the territory of both participating and non-participating MS,⁶ or
- b) when ancillary offences “inextricably linked” to criminal conduct falling within the material scope of competence of the EPPO are committed on the territory of a non-participating MS.⁷

In all these scenarios, precise rules for the relationships between the EPPO and the non-participating MS, as well as of the role of Eurojust and OLAF, are crucial in order to ensure the effectiveness of the EPPO’s investigations and prosecutions and, at the same time, respect for the fundamental rights of suspects and other persons involved in the proceedings of the EPPO.

As far as the effectiveness of the EPPO’s investigations is concerned, the situation is even more critical if we consider that Hungary and Poland, two of the five non-participating MS,⁸ are the largest beneficiaries of EU funds and are countries in which corruption and EU fraud-related problems are widespread and apparently not effectively prosecuted.⁹

As regards the fundamental rights of the persons involved in the proceedings of the EPPO, they may be compromised in the absence of a single regulation defining the relationship between the EPPO and non-participating Member States. There is a high risk that the EPPO will use evidence gathered by

other EU bodies, such as OLAF, in the criminal proceedings it initiates, without respecting the procedural safeguards that apply to criminal proceedings.¹⁰ This is particularly critical, because there are fundamental rights that apply only in criminal proceedings, and most EU initiatives on harmonisation of the rights of the defence and procedural safeguards are limited to criminal law *stricto sensu*. Only a regulation precisely defining the relationship between the EPPO and OLAF, in the three cases mentioned above concerning both participating and non-participating MS, would ensure the protection of the fundamental rights of suspects.

In particular, in cases involving *only* non-participating MS, the role of Eurojust and OLAF will gain great importance, since the EPPO has no jurisdiction. Eurojust would therefore normally be competent to support and strengthen coordination between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States (Art. 85 TFEU). OLAF would be competent to conduct administrative investigations in respect of EU fraud, which results in criminal proceedings if the competent national judicial authorities decide to initiate criminal proceedings¹¹ and to coordinate administrative authorities.

The matter is considerably more complex in the scenario involving *both* participating and non-participating MS. In such cases, the role of OLAF and Eurojust, just like the relationship between the EPPO and the non-participating MS, is not yet at all clear. As far as the relationship with OLAF is concerned, there is a particular risk of duplication of investigations or, conversely, a risk that neither the EPPO nor OLAF would conduct an investigation because each agency relies on the other having the competence to launch an investigation. This could result in a negative conflict of competence at the Union level. The role of Eurojust in these mixed cases is important as it could help coordinate the EPPO’s investigations with those conducted in the non-participating MS and strengthen the coordination between the EPPO and national authorities of non-participating MS.

The conditions under which cooperation between the EPPO and the non-participating Member States is organised determines the effectiveness of the investigations and prosecutions carried out by the EPPO. However, the solution adopted in the EPPO Regulation is not satisfactory in this regard. According to Art. 105 of the EPPO Regulation, which regulates the relationship between the EPPO and the non-participating MS, the forms of cooperation are scarce and have a limited scope of application. The relations that the EPPO can establish with non-participating Member States are the same as those that can be established between the EPPO, third countries, and international organisations (Art. 104). Duplicating the current

provisions on Eurojust,¹² the EPPO may conclude working arrangements on the exchange of strategic information and the secondment of liaison officers to its Office and, in agreement with the competent authorities concerned, designate contact points in the non-participating MS “in order to facilitate cooperation in line with the EPPO’s needs” (Art. 105(2) of the EPPO Regulation). In addition to these forms of cooperation between the EPPO and the non-participating MS, the third paragraph of Art. 105, which was finally included in the EPPO Regulation after discussions in the Council, provides the following: in the absence of a legal instrument relating to cooperation in criminal matters and surrender between the EPPO and the competent authorities of the non-participating MS, “the participating Member States shall notify the EPPO as a competent authority for the purpose of implementing applicable Union acts on judicial cooperation in criminal matters,” which means that the EPPO would be able to rely autonomously on existing EU instruments on judicial cooperation in its relations with non-participating Member States.¹³ As a result of this set-up, the relationship between the EPPO and the non-participating MS will be characterised by fragmentation, as it will rely on working agreements concluded between the EPPO and the non-participating MS, of which there may be as many different ones as there are non-participating MS. Thus, there is a risk of undermining not only the effectiveness of the EPPO’s investigations and prosecutions, but also the legal certainty of the rules applicable to the proceedings, which is a fundamental right in criminal proceedings. Legal certainty is particularly at stake because the applicable legal framework would not be foreseeable and accessible for suspects and other persons involved in the proceedings, considering the different provisions applicable.

A solution could be to adopt a separate instrument regulating in detail the relationship between the EPPO, the non-participating MS, and Eurojust and OLAF. In this regard, the Council invited the Commission to submit appropriate proposals in order to ensure effective judicial cooperation in criminal matters between the EPPO and the non-participating Member States.¹⁴ The adoption in the near future of a separate instrument to regulate cooperation in criminal matters and surrender between the EPPO and the competent authorities of non-participating MS would be a welcome clarification of the relationship between them and would provide a uniform regulation of their form of cooperation. It would be particularly positive if it contained detailed rules on support by the non-participating MS of the EPPO’s investigations and fostered the exchange of information between the EPPO and the competent authorities of the non-participating MS. Clarification of the relationship of the EPPO with Eurojust and OLAF when non-participating MS are involved would also be welcome.

In this regard, Art. 325(4) TFEU has been suggested as a legal basis for adopting such a separate instrument aimed at regulating judicial cooperation in criminal matters between the EPPO and the UK, Ireland, and Denmark as non-participating MS in the EPPO regulation.¹⁵ Art. 325(4) TFEU could admittedly serve as an appropriate legal basis for adopting such an instrument if the EPPO is granted limited competence over criminal offences affecting the financial interests of the EU. However, it would not be a suitable legal basis in the event that the competence of the EPPO is extended to serious crime having a cross-border dimension, such as terrorism. In that case, it would be necessary to adopt another separate instrument on a different legal basis to regulate the same relationship as far as terrorism-related crimes are concerned. In the event of adoption of two regulations on two different legal bases, there would be a risk of discrepancies between the two instruments. This is the reason why in the author’s view, it is preferable to adopt only one regulation relying on a different legal basis rather than Art. 325(4) TFEU. The adoption of such a regulation is extremely important, considering that the absence of a uniform and coherent separate instrument regulating the relationship between the EPPO, the non-participating MS, and the existing EU agencies could create incoherence and facilitate the creation of safe havens where the perpetrators of serious and transnational crime could look for impunity.

III. Extension of EPPO’s Competence to Terrorism-Related Crimes

In the author’s view, the establishment of the EPPO via enhanced cooperation also raises concerns in respect of another issue, namely the possibility of extending the competence of the EPPO to serious crimes having a cross-border dimension, such as terrorism-related offences. The question is whether the unanimous decision of all the MS would be necessary in order to extend the competence of the EPPO to serious crime having a transnational dimension, such as terrorism. In other words: would, the unanimous decision of only the MS participating in the enhanced cooperation suffice? This issue is not purely theoretical if one considers that one of the reasons that led one MS, Italy, not to immediately participate in the regulation establishing the EPPO was the fact that the draft Council regulation implementing enhanced cooperation on the establishment of the EPPO did not extend its competence to terrorism-related crimes.¹⁶ It is also important to remember that the extension of the competence of the EPPO to cross-border terrorist crimes was envisaged by Commission President Juncker in his 2017 State of the Union Address¹⁷ and by French President Emmanuel Macron in his 2017 speech at the Sorbonne University.¹⁸

The answer to this question is of considerable importance because the prospective decision to extend the competence of the EPPO to terrorism-related cases could end up being practically impossible or excessively difficult if the unanimous decision of all the MS were necessary. Two different opinions exist. In the view of some authors, the EPPO's competence can only be extended by all the EU MS.¹⁹ On the contrary, a Council document for the press and concerning the proposal on the creation of a EPPO affirmed that “[t]he decision to extend the powers of the EPPO would have to be taken unanimously at the level of the European Council *by the member states participating in enhanced cooperation*.”²⁰

Some argue that the solution to embrace is the one proposed by the Council. In the author's view, the combined reading of paragraphs 1 and 4 of Art. 86 TFEU supports this interpretation. Although Art. 86 TFEU is a *lex specialis* in respect of the rules of Title III of Part VI concerning enhanced cooperation, the same article itself explicitly states that the rules on enhanced cooperation apply.²¹ These general rules on enhanced cooperation should be considered *lex generalis*, while, in respect of the EPPO, Art. 86 TFEU has to be considered *lex specialis*. It follows that the general rules on enhanced cooperation stipulated in the Lisbon Treaty may be applied with respect to the EPPO as far as they do not conflict with the specific provisions enshrined in Art. 86 TFEU.

Considering that neither paragraph 4 nor paragraph 1 of Art. 86 TFEU stipulates the meaning of unanimous decision of the Council in case of enhanced cooperation (*i.e.*, if the unanimity is reached with the consent of all the MS or with the consent of only the MS participating in the enhanced cooperation), Art. 326 TFEU to 334 TFEU apply. The relevant provision for present purposes is Art. 330 TFEU, which states that “[a]ll members of the Council may participate in its deliberations, but only members of the Council representing the Member States participating in enhanced cooperation shall take part in the vote. Unanimity shall be constituted by the votes of the representatives of the participating Member States only.” The ECJ has clearly espoused this approach in the *EU Unitary Patent* judgment in which it stated that “nothing in Article 20 TEU or in Articles 326 TFEU to 334 TFEU forbids the Member States to establish between themselves enhanced cooperation within the ambit of those competences that must, according to the Treaties, be exercised unanimously. On the contrary, it follows from Article 333(1) TFEU that, when the conditions laid down in Articles 20 TEU and in Arts. 326 TFEU to 334 TFEU have been satisfied, those powers may be used in enhanced cooperation and that, in this case, *provided that the Council has not decided to act by qualified majority, it is the votes of only those Member States taking part that constitute unanimity*.”²²

As a result, taking up the jurisprudence of the ECJ and the wording of Art. 86 TFEU, the unanimous consent of the MS participating in the enhanced cooperation is sufficient for the extension of competence of the EPPO to serious transnational crimes. According to such an interpretation of the unanimity requirement contained in Art. 86 TFEU, the establishment of the EPPO via enhanced cooperation does not, at least from a procedural point of view, hinder the possibility of extending the competence of the EPPO to terrorism-related offences. As explained above, however, the absence of a clear and detailed act that regulates the relationship between the EPPO and the non-participating MS may hinder the effective investigation and prosecution of the perpetrators of such crimes in practice.

IV. Concluding Remarks

In conclusion, the establishment of the EPPO via enhanced cooperation does not ensure the achievement of the objectives pursued by the creation of such a supranational prosecutorial authority. These objectives are to investigate and prosecute the offences falling within its competence effectively and in full compliance with fundamental rights, to increase the number of prosecutions of crimes affecting the financial interests of the Union, to increase the deterrent effect for potential criminals, and to solve the “problems related to different applicable legal systems.”

In the absence of clear rules that would regulate the relationship between the EPPO, the non-participating MS, and the EU agencies concerned, *i.e.*, Eurojust, Europol, and OLAF, prosecutions may be impeded in practice by possible conflicts of jurisdiction – both positive and negative ones.

The possibility to escape the investigations of the EPPO in the non-participating MS will neither increase the deterrent effect for potential criminals nor solve the problems related to different applicable legal systems, considering also that the EPPO regulation refers to the relevant national laws of procedure. In addition, the minimal harmonisation envisaged in the regulation will not apply in respect of the non-participating MS. Consequently, this fragmentation and lack of uniformity will also undermine the fundamental rights of suspects and other persons involved in the EPPO's proceedings.

To conclude on a positive note, one should recall that, despite the shortcomings highlighted above, the final EPPO regulation undoubtedly constitutes the first step towards the creation of a supranational EU body that may be assigned the competence to deal with terrorism-related crimes in the future – even if it is established via enhanced cooperation.



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1 In this regard, unanimity means the consent of 25 Member States. Denmark, according to Article 1 of Protocol 22 annexed to the Treaties, does not participate in the EPPO regulation, and the UK and Ireland did not indicate that they wish to take part in the adoption and application of the EPPO regulation within three months of the publication of the Commission's proposal. According to Articles 1 and 3 of Protocol 21 annexed to the Treaties, they are therefore not taken into account for the purpose of the unanimous decision of the Council. As far as the United Kingdom is concerned, on the 29th March 2017, the European Council received a letter from the British Prime Minister notifying it about the United Kingdom's intention to leave the European Union. This notification follows the referendum of 23 June 2016 and starts the withdrawal process under Article 50 TEU. However, the UK is currently still a Member State of the EU – until the date of entry into force of the withdrawal agreement or “failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period”. See Article 50 TEU.

2 See Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (“the EPPO”), *O. J. L* 283, 31.10.2017, pp. 1–71.

3 Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM(2013) 534 final, p. 51.

4 H. Satzger, “The Future European Public Prosecutor and the National Prosecution: Potential Conflicts and How They Could be Avoided”, in: P. Asp (ed.), *The European Public Prosecutor's Office – Legal and Criminal Policy Perspectives*, European Criminal Policy Initiative, 2015, pp. 69, 78.

5 House of Lords, European Union Committee, “The impact of the European Public Prosecutor's Office on the United Kingdom”, 4th Report session 2014–15, <<https://publications.parliament.uk/pa/ld201415/ldselect/lducom/53/5302.htm>>, par. 55.

6 V. Mitsilegas, Follow-up evidence to House of Lords European Union Committee for their inquiry on “The impact of the European Public Prosecutor's Office on the United Kingdom”, 4th Report, session 2014–2015, HL Paper 53.

7 Article 22(3) of the current draft regulation. For further details, see S. Pawelec, “Implications of Enhanced Cooperation for the EPPO Model and Its Functioning”, in: L.H. Erkelens A.W.H. Meij, and M. Pawlik (eds.), *The European Public Prosecutor's Office, An Extended Arm or a Two-Headed Dragon?*, 2015, p. 209 ff.

8 The five non-participating Member States are Sweden, the Netherlands, Malta, Hungary, and Poland. For a detailed overview of the Dutch position on the EPPO, see J. Van Der Hulst, “No Added Value of the EPPO?”, (2016) *eu crim*, 99–103.

9 F. Giuffrida, “Now or Never: the European Public Prosecutor's Office and Enhanced Cooperation”, Societal Security Network, <<http://observatory.societalsecurity.net/blog/now-or-never-european-public-prosecutor%E2%80%99s-office-and-enhanced-cooperation>> accessed 10 October 2017.

10 In this regard, the Commission issued a communication aimed at reinforcing the procedural safeguards applying in OLAF investigations. The safeguards envisaged by the Commission in the communication, however, are lower in any case than those applying in criminal proceedings. See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Improving OLAF's governance and reinforcing procedural safeguards in investigations: A step-by-step approach to accompany

the establishment of the European Public Prosecutor's Office, Brussels, 17.7.2013 COM(2013) 533 final.

11 See Arts. 1, 2, 3, 11 of the Regulation (EU, EURATOM) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999, L 248/1, 18 September 2013.

12 According to Articles 26a and 27a of the Eurojust decision (see the consolidated version at Council doc. 5347/3/09 REV 3 of 15 July 2009), liaison officers can be seconded to Eurojust, and contact points can be designated in numerous countries.

13 A. Weyembergh and C. Briere, “The future cooperation between OLAF and the European Public Prosecutor's Office (EPPO)”, [http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/603789/IPOL_IDA\(2017\)603789_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/603789/IPOL_IDA(2017)603789_EN.pdf), accessed 7 November 2017, p. 25.

14 Council, Draft Regulation implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office – Draft Council Declarations, Brussels, 7 June 2017, 9896/17 ADD 1. Also see in this regard Recital 110 of the current draft regulation.

15 Proposal for a Regulation on the establishment of the European Public Prosecutor's Office – Discussion paper on cooperation between EPPO and non-participating Member States, Brussels, Council doc 12341/16 of 19 September 2016.

16 The Italian Justice Minister Andrea Orlando wrote in a letter addressed to the European Justice Commissioner, Vera Jourová, and to his Estonian counterpart, Urmas Reinsalu: “We have to start thinking of extending the European Prosecutor's powers with regards to terrorism-related crimes, as envisioned in the treaties, through the same procedure that brought EPPO [European Public Prosecutor's Office] to tackle crime and fraud against the European budget.” <<https://www.euractiv.com/section/politics/news/italy-pushes-for-deeper-european-cooperation-on-terrorism/>> accessed 10 October 2017.

17 See, European Commission – Speech, President Jean-Claude Juncker's State of the Union Address 2017, Brussels, 13 September 2017, http://europa.eu/rapid/press-release_SPEECH-17-3165_en.htm.

18 See President Macron, discours à la Sorbonne, published on 26 September 2017, <http://www.elysee.fr/declarations/article/initiative-pour-l-europe-discours-d-emmanuel-macron-pour-une-europe-souveraine-unie-democratique/>. See also T. Wahl in the news section of this issue.

19 See J.J.E. Schutte, “Establishing Enhanced Cooperation Under Article 86 TFEU”, in: L.H. Erkelens, A.W.H. Meij, and M. Pawlik (eds.), *The European Public Prosecutor's Office, An Extended Arm or a Two-Headed Dragon*, p. 195, 202, who writes that “in that case, all its members, including the heads of government of Denmark, the UK and Ireland, including the President of the Commission, as well as the President of the European Council, have the right to take part in the vote, even if the regulation establishing the EPPO has been adopted in enhanced cooperation and is applicable in a limited number of Member States only.” See also, from a slightly different perspective, K. Ligeti, “Introduction to the Model Rules of Procedure of the EPPO”, in: K. Ligeti (ed.), *Toward a prosecutor for the European Union*, 2013, p. 2, footnote 5, in which the author affirms the following: “It is hard to imagine that the Council would agree to extend the material scope of the EPPO by unanimous decision to cover cross-border crime, on the one hand, and disagree at the same time on the establishment of the EPPO per se, on the other”.

20 Council of the European Union, Factsheet, Brussels, 7 March 2017, Proposal on the creation of a European Public Prosecutor's Office (EPPO), State of play. It is implicitly assumed in this document that the unanimous decision should be taken by the MS participating in the enhanced cooperation and not by all the MS, including the non-participating MS.

21 Art. 86(1) TFEU states that, in the event that at least nine Member States wish to establish enhanced cooperation on the basis of the draft regulation concerned, “the authorisation to proceed with enhanced cooperation referred to in Art. 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.”

22 ECJ, 16 April 2013, joined cases C-274/11 and C-295/11, *Kingdom of Spain and Italian Republic v. Council of the European Union*, para. 35. *Emphasis added.*

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