
Recent Developments

European Criminal Justice Integration 5.0: Towards a European Public Prosecutor's Office. By Johanna Goehler[†]

Each year, the European Union loses approximately €3 billion due to fraud.¹ National law enforcement authorities, although exclusively competent to prosecute offences against the EU's budget, do not sufficiently intervene.² In times of economic crisis and declining citizen trust, the EU is no longer prepared to accept this waste of taxpayer money, and has recently proposed what has become the most controversial issue in EU criminal justice policy: the establishment of a European Public Prosecutor's Office (EPPO).

I. THE SIGNIFICANCE OF A EUROPEAN PUBLIC PROSECUTOR

Currently, the administration of criminal justice within the EU is exclusively a task for the member states. EU involvement in criminal matters is limited to facilitating cooperation between the nation states, primarily through enhancing mutual recognition of judicial decisions, and secondarily through harmonizing specific areas of national criminal law. European law enforcement authorities and European criminal law *sensu stricto* do not yet exist. The EPPO would be the first supranational authority competent to prosecute crimes against the EU's financial interests throughout the EU.³ Thus, the implementation of an EPPO would signal a paradigm shift. For the first time, the EU would take on direct responsibility for the protection of its financial

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1. *Commission Impact Assessment Accompanying the Proposal for a Council Regulation on the Establishment of the European Public Prosecutor's Office*, at 7, SWD (2013) 274 final (July 17, 2013).

2. *See id.* at 6-7 (noting that "the rate of successful prosecutions . . . varies considerably across the EU"); *Proposal for a Council Regulation on the Establishment of the European Public Prosecutor's Office*, at 2, COM (2013) 534 final (July 17, 2013) [hereinafter *Proposal*] (noting that "Member States' criminal investigation and prosecution authorities are currently unable to achieve an equivalent level of protection and enforcement").

3. The currently existing EU bodies Eurojust, Europol, and the European Anti-Fraud Office only coordinate national prosecution measures, but lack their own enforcement powers. *See* Christine van den Wyngaert, *Eurojust and the European Public Prosecutor in the Corpus Juris Model: Water and Fire?*, in *EUROPE'S AREA OF FREEDOM, SECURITY, AND JUSTICE* 201, 206, 215 (Neil Walker ed., 2004). In addition to the proposed authority, the European Council may also extend the EPPO's prosecutorial power to include serious crimes having cross-border dimensions. *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 86(4), Mar. 30, 2010, 2010 O. J. (C 83/47) [hereinafter TFEU]. This expanded mandate would differ substantially from the current authority to prosecute financial crimes against the EU. *See* Marianne Wade, *A European Public Prosecutor: Potential and Pitfalls*, 59 *CRIME L. SOC. CHANGE* 439, 441-43 (2013).

interests, combat insufficient prosecution priorities of the member states, and offer a progressive answer to cross-border challenges in an open-border environment.

The proposal's reformative and controversial character is indicated by its long history of evolution. By the 1990s, scholars had introduced the idea of a European public prosecutor;⁴ and in 2001, the European Commission took it up in a green paper.⁵ Yet, only the 2009 reformation of the EU core treaties gave the EU the actual legal power for its implementation, promoting the vision of a supranational prosecutor into a realistic possibility.⁶ With the recent economic crisis contributing to a favorable political climate, the EU has now finally initiated the legislative procedure to establish an EPPO.⁷

II. CHALLENGES IN A MULTI-LEVEL GOVERNANCE SYSTEM

As the EU is pushing for the implementation of an EPPO, certain member states are concerned that a supranational prosecutor would interfere with something they regard as a core field of national sovereignty: their administration of criminal justice. In fact, Denmark, the United Kingdom, and Ireland have decided not to participate in the EPPO.⁸ Along similar lines, parliaments of eleven member states have filed complaints that the current legislative proposal fails to comply with the EU subsidiarity requirement.⁹ While some critics contest the overall need for action, others claim that the EU

4. See CORPUS JURIS: PORTANT DISPOSITIONS PÉNALES POUR LA PROTECTION DES INTÉRÊTS FINANCIERS DE L'UNION EUROPÉENNE (Mireille Delmas-Marty ed., 1997), arts. 18-24.

5. *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 (Dec. 11, 2001).

6. See TFEU art. 86, *supra* note 3.

7. The Commission issued the proposal in July 2013, *Proposal*, *supra* note 2. The European Parliament endorsed the proposal, see *Resolution on the Proposal for a Council Regulation on the Establishment of the European Public Prosecutor's Office*, COM (2013) 534 (Mar. 12, 2014), and it is currently under negotiation in the Council of the EU, see *Draft Council Regulation on the Establishment of the European Public Prosecutor's Office*, 9834/1/14 REV 1 (Annex) (May 21, 2014) [hereinafter *Draft Council Regulation*].

8. Denmark decided up front not to participate in the EPPO under the EU treaties. See Protocol (No. 22) on the Position of Denmark, art. 1, Oct. 26, 2012, O. J. (C 326) 299. The United Kingdom and Ireland have a specific right under the EU treaties to decide if they want to take part in the adoption of an EPPO. See Protocol (No. 21) on the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice, arts. 1(1), 3(1), Oct. 26, 2012, 2012 O. J. (C 326) 295. They opted against it. See Memorandum from the Eur. Pub. Prosecutor's Office: Comm'n Proposal Gains Momentum (MEMO/14/154) (Mar. 4, 2014) ("The United Kingdom and Ireland decided not to opt-in under the Treaties and therefore will not participate [in the EPPO] either.").

9. Consolidated Version of the Treaty on European Union art. 5(3), May 9, 2008, 2008 O. J. (C 115) 18 ("Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States . . . but can rather . . . be better achieved at Union level."). Regarding the complaints, see *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 (Nov. 27, 2013) [hereinafter *Communication*]. For a discussion on the underlying reasons for the member states' resistance, see Katalin Ligeti & Michele Simonato, *The European Public Prosecutor's Office: Towards a Truly European Prosecution Service?*, 4 NEW J. EUR. CRIM. L. 7, 8-10 (2013).

should instead strengthen the existing cooperation mechanisms.¹⁰ Such interventions, these latter critics posit, would infringe less on national sovereignty and protect the EU budget more efficiently and cost-effectively.

These concerns reflect a widespread skepticism that has confronted the idea of an EPPO since its inception. Yet, with the recent economic crisis, the climate has changed. The current political and academic debate centers less on *if* the EPPO should exist and has instead shifted to *how* it should be established.

III. A DECENTRALIZED AND INTEGRATED MODEL

The proposed regulation on the establishment of the EPPO addresses various questions regarding the functioning of the future office.¹¹ The rules that determine the envisioned EPPO's character most are those that govern its organization and *modus operandi*.

Regarding *organization*, the EPPO would be structured as an independent European institution consisting of a central authority and decentralized system of European delegated prosecutors. The European delegated prosecutors would be integrated into national prosecution systems and carry out operational work on behalf of the EPPO. The central authority would decide strategic matters, such as the EPPO's prosecution policy, and monitor operational work.¹²

Regarding the *modus operandi*, the EPPO would be competent¹³ to lead the investigation and prosecution of offenses against the EU's budget in the member states.¹⁴ The pretrial procedure would be governed primarily by the law of the member state on whose territory an investigation is conducted.¹⁵ EU law would only prescribe certain minimum standards;¹⁶ the enactment of a comprehensive European code of criminal procedure is not planned.¹⁷ Finally,

10. See *Communication*, *supra* note 9. For similar critiques among scholars, see, for example, Michele Caianiello, *The Proposal for a Regulation on the Establishment of an European Public Prosecutor's Office: Everything Changes, or Nothing Changes?*, 21 EUR. J. CRIME CRIM. L. & CRIM. JUST. 115, 123-25 (2013).

11. Article 86(3) of TFEU outlines topics that the regulation must address, including the EPPO's structure and rules on procedure, evidence, and judicial review. TFEU art. 86(3).

12. The design of the central authority is highly controversial. While the Commission has proposed a hierarchical model headed by one chief European prosecutor, the member states prefer a more complex "college" structure, led by a board representing all member states. This preference is unsurprising since the college model would make the states more involved in the EPPO. See *Draft Council Regulation*, *supra* note 7, arts. 7-12.

13. The scope of its competence is contentious. Some national ministers who favor *concurrent* competence, see *Draft Council Regulation*, *supra* note 7, art. 19, object to the Commission's Proposal's grant of *exclusive* competence to the EPPO to investigate and prosecute criminal offenses against the EU's financial interests, see *Proposal*, *supra* note 2, art. 11(4).

14. Harmonized domestic law would define these offenses. For a detailed discussion of the substantive law applied by the EPPO see Bettina Weißer, *Strafgesetzgebung durch die Europäische Union: Nicht nur ein Recht, sondern auch eine Pflicht? [EU Penal Legislation: Not Only a Right, But Also a Duty?]*, GOLDAMMER'S ARCHIV FÜR STRAFRECHT 433 (2014) (Ger.).

15. *Proposal*, *supra* note 2, art. 11(3).

16. The minimum standards primarily concern investigative measures and procedural safeguards, see *Proposal*, *supra* note 2, arts. 26, 32-35.

17. Scholars have criticized this integrated approach, see, e.g., Anette Grünewald, *Eine*

the EPPO would bring its cases before domestic criminal courts,¹⁸ applying *lex fori*, since the EU treaties do not envisage the creation of a genuine European criminal court.

This brief introduction to the legislative proposal demonstrates certain key characteristics of the envisioned EPPO: decentralization, integration with the national legal systems with prevailing application of domestic law, and close cooperation with national law enforcement authorities. These characteristics may be surprising in the context of a supranational authority.¹⁹ Officially, they are justified as having practical advantages.²⁰ Practically, they represent the reality that EU legislators must respect the member states' concerns over forfeiting their sovereignty when deciding on the design of the EPPO; otherwise, the member states will refuse to participate. The European Commission's decentralized and integrated approach is intended to mitigate these national concerns and promote greater support for the proposal among the member states. Clearly, criminal justice initiatives in the EU multi-level governance system have to reconcile this tension. Yet the European legislators will have to tread carefully to ensure that this endeavor does not jeopardize the efficiency of the future Office or its commitment to due process. Two amendments are needed to address these perils.

First, the proposed system of judicial review for measures undertaken by the EPPO needs to be revised. The current proposal suggests entrusting the member states with the judicial control of the EPPO. Yet this approach would result in a random variation, and in some instances, complete absence of judicial review, especially with regard to EPPO's dismissal decisions. To guarantee an efficient prosecution throughout the EU, a supranational solution to judicial review on EPPO's dismissal decisions is necessary.²¹ Second, in order to secure equality of arms and due process, EU criminal justice initiatives will have to strengthen not only transnational prosecution, but equally transnational defense.²²

Europäische Staatsanwaltschaft nach den Vorstellungen der Europäischen Kommission [A European Public Prosecutor According to the Ideas of the European Commission], 14 ONLINEZEITSCHRIFT FÜR HÖCHSTRICHTERLICHE RECHTSPRECHUNG ZUM STRAFRECHT [HRRS] 508, 512-14 (Dec. 2013) (Ger.), <http://www.hrr-strafrecht.de/hrr/archiv/13-12/index.php?sz=7>; and instead campaigned for unified supranational rules governing the pre-trial procedure, see Katalin Ligeti, *Model Rules for the Procedure of the EPPO*, <http://eppo-project.eu/design/eppodesign/pdf/converted/index.html?url=f407f0c18e139b7f8f9c04ffd26a1396.pdf> (last visited Dec. 4, 2014).

18. The EPPO would choose the court in compliance with statutory criteria. See *Proposal*, *supra* note 2, art. 27.

19. For scholarly critiques of this proposed structure, see, for example, Grünewald, *supra* note 17, at 515; Caianiello, *supra* note 10, at 123-25. For a more positive perspective on the initial "low key compromise" that an EPPO requires from states, see Ligeti & Simonato, *supra* note 9, at 21.

20. *Communication from the Commission, Better Protection of the Union's Financial Interests: Setting Up the European Public Prosecutor's Office and Reforming Eurojust*, at 7, COM (2013) 532 final (July 17, 2013).

21. For details, see Johanna Goehler, *To Continue or Not: Who Shall Be in Control of the European Public Prosecutor's Dismissal Decisions?*, 6 NEW J. EUR. CRIM. L. (forthcoming Mar. 2015).

22. For example, by installing an institutionalized defense mechanism at the European Union level. See European Criminal Policy Initiative, *A Manifesto on European Criminal Procedure Law*, 8 ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK [ZIS] 430, 440 (2013) (Ger.),

CONCLUSION AND FORECAST

The ultimate rules for establishing the EPPO remain intensely debated. Certain provisions still require close scrutiny and revision to guarantee the creation of a supranational office dedicated to justice and efficiency. Despite these controversies, the EPPO project is closer to reality than it has ever been before. An immediate EU-wide implementation would require unanimity in the Council of the EU. Nevertheless, with the cooperation of at least nine member states, the EPPO could begin as an enhanced cooperation project.²³ Given the initiative of supportive member states such as Germany and France, the introduction of enhanced cooperation is very realistic. As such, the EPPO would start off akin to successful EU projects like the Schengen Agreement, whose scope of application has since been extended.²⁴

For EU integration, the implementation of an EPPO would signal a paradigm shift. The introduction of a supranational prosecutor would revolutionize criminal prosecution systems that rely on interstate cooperation. Through this move, the EU would take a step towards creating a truly European area of criminal justice and taking on a lead role in the European criminal justice administration.

http://www.zis-online.com/dat/artikel/2009_12_383.pdf.

23. TFEU art. 86(1), *supra* note 3.

24. The Schengen Agreement between the states of the Benelux Economic Union, Germany, and France facilitated the creation of a borderless area in Europe. *See* The Schengen Acquis – Agreement Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at Their Common Borders, Sept. 22, 2000, 2000 O. J. (L 239/13-18).