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The European Public Prosecutor's Office: The future?

Master Thesis

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Once upon a time
there was a forest where all animals lived together in peace.
There were 28 different herds, each with their own king.
The kings decided to put a small amount of their food together in a common basket so that if one of
the herds had a bad hunt, they could rely on this.
One day the smartest amongst the kings, the fox, noticed that a part of the common food was being
stolen by the bears.
He summoned all the other kings and said: "The bear-herd is stealing from our common basket. Their
king should step up and punish his herd!"
King bear ignored this lecture and did nothing.
A few days later, a part of the common food was stolen by the wolves.
King fox repeated his speech but again nothing was being undertaken.
After two weeks, the common basket was completely empty.
When king fox asked the other kings why they never punished their herd for stealing from the
common basket, they answered: "When a part of the common food gets stolen, we lose only $1/28^{\text{th}}$
of our own food while the cost of punishing someone exceeds this amount by far!"
*What a tragedy, thought king fox, they will go through fire to protect their own food but the common
cause is of no importance to them. A real tragedy of the commons this is...*

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List of abbreviations

Art. = Article

CATS = Committee on Article Thirty Six

COPEN = Committee on Cooperation in Criminal Matters

EC Treaty = Treaty establishing the European Communities

ECJ = European Court of Justice

EEC Treaty = Treaty establishing the European Economic Community

EJN = European Judicial Network

EPPO = European Public Prosecutor's Office

EPP = European Public Prosecutor

EU = European Union

FD = Framework Decision

IC = Intergovernmental Conference

ICC = International Criminal Court

JHA = Justice and Home Affairs

JIT = Joint Investigation Team

MLA = Mutual Legal Assistance

MR = Mutual Recognition

OLAF = Office de Lutte Anti-Fraud (Fr.), European Office for the Fight against Fraud (En.)

PIF = Protection des Intérêts Financiers (Fr.), Protection of the Financial Interests (En.)

TEU = Treaty on the European Union

TFEU = Treaty on the Functioning of the European Union

UCLAF = Unit for Coordination of Fraud Prevention

Introduction

I. Foreword

The European Public Prosecutor's Office, hereafter 'EPPO', is due to be established on 1 January 2015. This thesis aims to provide an answer to the question whether an EPPO is needed, desirable and feasible considering the European environment, the current prosecuting practices of EU fraud and the Member States' and EU bodies' views on a supranational prosecuting authority.

The proposal on the EPPO¹ is part of a package of measures aimed at better protecting the Union's financial interests. As it is currently only the national authorities that are entitled to prosecute crimes of EU fraud, the idea is to create a supranational EU body as a weapon against the criminal misuse of EU money. The EPPO would be able to investigate, prosecute and bring to justice those who damage assets managed by or on behalf of the EU and would have binding powers to do so.

Especially in times of financial crisis, the objectives of the EPPO have great importance because the damage caused by offences against the Union's budget is significant.² It is more important than ever to make sure that EU funds are legitimately used and that fraudsters are being effectively prosecuted and sufficiently punished. So the European Commission took action in this matter and put the idea of an EPPO back on the agenda after more than 15 years. In an environment of intergovernmental EU bodies such as Eurojust, Europol and OLAF, the EPPO has been widely criticized by several Member States, EU bodies, academics and practitioners, because it is a detriment to the horizontal cooperation that some Member States are desperately trying to preserve. That is why it took all these years for the EPPO to find its way to being the hot topic it currently is.

¹ European Commission, Proposal for a Council Regulation on the establishment of a European Public Prosecutor, COM (2013) 534 final, Brussels, 17 July 2013. Hereafter: the EPPO proposal.

² For instance, in 2010 there were altogether 600 suspected fraud cases with a total damage volume of approximately 600 million euros – O. SAUER and S. CZURATIS, "EU Directive, Combatting fraud by means of EU criminal law", *CEP Policy Brief*, no. 2013-04, 28 January 2013, p. 1.

II. Research questions

1. Need for the EPPO

After an assessment of the background of the EPPO proposal, it will be examined whether the EPPO has justly re-entered the EU's agenda. Therefore, the need for an EPPO must be proven. It is essential for the EPPO to sustain the subsidiarity test, which triggers several new questions. Firstly, as the EPPO is set forward as a measure to protect the EU budget, the damages to the EU budget caused by financial crimes will be assessed.

Secondly, as it is currently up to the Member States to investigate and prosecute offences against the financial interests of the EU, the national investigation and prosecution practices will be analysed to search for reasons that cause the losses to the EU budget.

Thirdly, the essence of the subsidiarity test will be evaluated. In the first part it will be analysed whether Member States, upcoming legislation and/or existing EU bodies can solve the current inadequate prosecuting situation and in the second part, the added value of an action at EU level in the form of an EPPO will be examined.

2. Desirability of the EPPO

There are critics who believe it would be better to extend Eurojust, the body that is currently in charge of coordination and facilitation of cooperation between the Member States, rather than to create a new independent body in which the EU will need to invest a lot of resources. In this chapter it will be analysed whether the strengthening of Eurojust's powers would be sufficient and would abrogate the need for an EPPO. Also it will be examined whether extending the powers of Eurojust and setting up an EPPO is an 'or-or' decision or rather two processes that should be established concurrently.

3. Feasibility of the EPPO

Finally, after examining the necessity and desirability of the EPPO, it is fundamental to analyse the feasibility of this concept. In this chapter the practicalities of setting up an EPPO will be looked into, starting from the legal basis provided in Article 86 TFEU. Firstly, the decision making procedure to establish the EPPO will be explained, with a focus on the possibility of establishing an EPPO through enhanced cooperation and the special status of the UK, Ireland and Denmark. Secondly, the organisational, substantive and procedural aspects of how an EPPO would function in practice will be examined. Thirdly, the future relationship of the EPPO with the existing EU bodies dealing with

offences against the financial interests of the EU will be analysed. Also the opinions of Eurojust, Europol and OLAF will be mentioned. Lastly, it will be assessed whether the EPPO should have its own police force or whether it should be dependable on the national law enforcement authorities and/or Europol/OLAF.

III. Methodology

1. Sources of information

The majority of the information used to draught this thesis is found in literature, policy documents of the EU, doctrine and case law. Certain articles on the internet will also be a source of information because of the fact that the EPPO currently is a hot topic of debate on many websites.

Interviews with figures related to Eurojust (Angeles Gutiérrez-Zarza, legal officer at Eurojust) and Europol (Roger Van de Sompel, the Belgian Europol liaison officer) will be included in this thesis.

2. Point of view

This thesis will mainly be written from a political point of view, with an open mind towards the establishment of an EPPO. Since this is a thesis in the Master of Law, some legal insights and comments will also be provided.

3. Timeframe

Information for this thesis is gathered from approximately February 2013 up to and including March 2014. Further progress will without a doubt be extremely interesting and worth keeping an eye on but the deadline of 15 May 2014 for this thesis prevented to be further up to date than the end of March 2014.

4. Limited to the EU, not third states

Because of the limited space and time available for this thesis, the countries outside of the EU will be left out of the research. It is acknowledged that there are also problems in the investigation and prosecution of crimes affecting the EU's financial interests where there are not only EU Member States but also third states involved, and that there are several provisions in the EPPO proposal that describe the EPPO's relationship with third countries. However, these issues are not within the scope of this thesis.

5. EU bodies

When the relation between the EPPO and other EU bodies will be assessed, a clear focus will lay on Eurojust, Europol and OLAF. These bodies are chosen because of their relevance in the field of international cooperation³ and fraud investigations, and because they will probably have the most frequent contacts with the EPPO. A specific emphasis on Eurojust is in order because the words “*from Eurojust*” in Article 86 TFEU indicate an obvious connection between Eurojust and the EPPO, and because Eurojust is the only European body that currently ensures international cooperation between the Member States in the fight against serious cross-border crime. That is why there will be dedicated a chapter on the possibility to strengthen the powers of Eurojust as envisaged in Article 85 TFEU.

6. Member States

When the practices in the Member States are discussed, a clear focus will lay on Belgium, the UK and Germany. There is a distinct interest for Belgium as it is one of the Member States which supported the EPPO proposal from the beginning. Further, the UK and Germany are considered to be representative. The UK because it is widely seen as the representative state for the Common Law countries and because it will not participate in the EPPO proposal.⁴ Germany because it is interesting how it has changed its attitude about the EPPO in the last decade from being rather sceptical towards the idea in 2003⁵ to being one of the biggest supporters of the EPPO in 2014⁶.

³ It is more consistent to speak of ‘international cooperation’ instead of making the distinction between police and judicial cooperation. This is because the distinction between police and judicial cooperation is very artificial, not justifiable nor workable and because judicial cooperation is broader than the mere cooperation between judicial authorities.

⁴ UK House of Commons – European Scrutiny Committee, “European Public Prosecutor’s Office: Reasoned Opinion, Reform of Eurojust, European Anti-Fraud Office”, fifteenth report of session 2013-14, published 17 September 2013, p. 5, <http://www.publications.EuropeanParliament.uk/>, accessed 12 March 2014.

⁵ Commission of the European Communities, Follow-up report on the Green Paper on the criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, COM (2003) 128 final, Brussels, 19 March 2003, p. 6.

⁶ Déclaration conjointe des Ministres français et allemande de la justice, “Projet de creation d’un parquet européen”, 19 February 2014, <http://www.bmjv.de/>, accessed 15 April 2014.

Chapter one: Background of the EPPO proposal

“The idea of a European Public Prosecutor’s Office is not new and it did not pop up from thin air.”

N. NEAGU, 2013.⁷

I. Growing importance of a EU common judicial area

The European Union started out as the European Economic Community in 1957.⁸ As the name states out, the focus in this community lied on an economic and monetary union. But a growing trend was palpable. Since the early 1960’s there was an increasing number of crimes affecting the European Communities’ budget due to the globalisation, so the focus was shifting to the combat of EC fraud. It was up to the Member States to tackle this fraud problem because they were responsible for more than 80% of the EC’s expenditure, through e.g. funds, subsidies and regional aid.⁹ The Community institutions were not entitled to combat these offences against the EC’s financial interests because the legal basis for this action was lacking.¹⁰ So up until the 1990’s the EU¹¹ fraud control was considered very fragmented, having no general framework and only sector-specific regulations.

Crimes against the EU’s financial interests increased and in the early 1990’s the European Commission estimated that fraud took up as much as 10% of the total Union budget. Although the European Commission respected the sovereignty of the Member States, it started to realize more and more that the fraud problem could not be tackled seriously without action on the European level and began to develop a European judicial area with an adequate anti-fraud policy.

⁷ N. NEAGU, “The European public prosecutor’s office – Necessary instrument or political compromise?”, *Law Review*, vol. 3, issue 2, July-December 2013, p. 55.

⁸ Established by the Treaty establishing the European Economic Community, Rome, 25 March 1957, <http://www.cvce.eu/>, accessed on 22 April 2014.

⁹ J. VERVAELE, “Towards an independent European Agency to fight fraud and corruption in the EU?”, in *Crime, Criminal Law and Criminal Justice in Europe*, 2013, p. 529.

¹⁰ S. A. READER, “Moving Forward, Never Backwards: Preventing fraud in the European Union and defining European Central Bank Independence”, *Fordham International Law Journal*, 2003, p. 1521.

¹¹ Although still the EC at that time, hereafter it will be called the EU.

The Member States also felt that the need for a European general framework was pressing but they feared the power of the EU as a supranational authority. TONRA¹² described this phenomenon very accurately as the ‘double fear-syndrome’. Member States’ acceptance of the EU as a supranational force was born out of fear and being imprisoned by fear: they embraced a supranational EU because “they were threatened by forces over which they had no control and which they thought might be more effectively tackled through collective action”. Fear, however, also undermined those collective efforts because “Member states, differentiated by administrative interests, by historical experience, by legal tradition and by political psychology, sought to maintain national control over an area of public policy which in part defined them as independent states”.¹³

II. Intergovernmentalism vs. supranationality

1. Until 1992: no legal basis for supranational EU action

Traditionally, criminal law has been dealt with through intergovernmental cooperation at Member State level.¹⁴ In the beginning of the 1990’s the European Commission and the European Council tried to find a way to protect the financial interests themselves through several legislative proposals.¹⁵ However, it was too early for the EU to claim the criminal protection of the EU’s financial interests because a legal basis for its competence was lacking. It was solely up to the Member States to tackle the fraud problem. An important step of the European Commission was the proposal to amend the EEC Treaty in 1976 with the provision to adopt common rules for the criminal law protection of the EU’s financial interests and the principle of assimilation which would provide an equivalent protection for the financial interests of both the EU and the Member States.¹⁶ Seeing the

¹² Ben Tonra is Jean Monnet Professor *ad personam* of European foreign, security and defence policy and associate Professor of international relations at the UCD School of politics and international relations.

¹³ B. TONRA, “The Politics of Justice”, in G. BARRETT (Ed.), *Justice Cooperation in the European Union*, Institute of European Affairs, 1997, p. 57.

¹⁴ E. HERLIN-KARNELL, “The Lisbon Treaty and the area of criminal law and justice”, *European Policy Analysis*, 2008, p. 2.

¹⁵ D. SPINELLIS, “Ten years of efforts for an effective protection of the financial interests of the European Union”, *Agon.*, no. 25, 1999, p. 16.

¹⁶ J. VERVAELE, *Fraud against the Community: the need for European fraud legislation*, Kluwer, 1992, p. 85-89.

intergovernmental decision making procedure, the Member States needed to adopt this proposal, which they refused.¹⁷

In 1987 the European Commission, encouraged by the European Parliament, acted on this immobile situation with the creation of the Unit for Coordination of Fraud Prevention¹⁸, a Commission-office through which the European Commission protected the financial interests of the EU. This agency became operational in 1988 and had several competences, including supervisory, legislative and coordinating powers.¹⁹ The measures it could take however were not of a supranational nature and merely to support the Member States. UCLAF's powers remained to be mainly administrative and not efficient enough. The Court of Auditors found a two-way problem: "*Structurally UCLAF does not have sufficient status, but at the same time operationally it does not make the most of the status it has*".²⁰ This critique was worrying, so the European Parliament was encouraged to give UCLAF more competences and eventually in 1999 to turn this into a new independent anti-fraud office within the European Commission: OLAF.

In the Greek Maize case of 1989²¹ the European Court of Justice ruled for the first time an important judgement for the efficient protection of the financial interests of the EU. Infringements affecting the financial interests of the EU now had to be penalised under the same conditions as infringements affecting the national budget and sanctions had to be "*effective, proportionate and dissuasive*". This is called the principle of assimilation.

¹⁷ P. SZAREK-MASON, *The European Union's fight against corruption: The evolving policy towards Member States and candidate countries*, Cambridge University Press, 2010, p. 74.

¹⁸ Hereafter: UCLAF.

¹⁹ Commission of the European Communities, Report on tougher measures to fight against fraud affecting the Community budget, COM (1987) 572 final, Brussels, 20 November 1987, p. 14, <http://aei.pitt.edu/>, accessed 6 March 2013.

²⁰ Committee of Independent Experts, Second report on Reform of the European Commission: Analysis of current practice and proposals for tackling mismanagement, irregularities and fraud, 10 September 1999, p. 22, <http://www.europarl.europa.eu/>, accessed on 15 March 2013.

²¹ Commission of the European Communities v. Hellenic Republic, 21 September 1989, C-68/88, ECR 2965, <http://eur-lex.europa.eu/>, accessed on 21 March 2013.

2. 1992-1999: limited legal basis but division of competences

The Treaty of Maastricht²² of 1992 turned the EC into the EU and ensured that there was less immobility and stagnation in the area of European criminal justice. It amended the EEC Treaty²³ and incorporated Justice and Home Affairs into the European institutional framework. Article K.1 of the Maastricht Treaty clarified that Member States should regard the combatting of fraud on an international scale and judicial and police cooperation as matters of common interest. This is the first time judicial and police cooperation in criminal matters appears in EU treaties.²⁴ Also, the Treaty inserted the principle of assimilation and horizontal cooperation in Article 209a EEC Treaty: “*Member States shall take the same measures to counter fraud affecting the financial interests of the Community as they take to counter fraud affecting their own financial interests.*”²⁵ *The Member States shall coordinate their action. To this end they shall organise, together with the Commission, close and regular cooperation between the competent authorities*”.²⁶ The Treaty of Amsterdam²⁷ changed this into Article 280 EC Treaty and the Treaty of Lisbon into Article 325 TFEU²⁸.

This article requires both the Member States and the European institutions taking measures to tackle fraud against the EU’s financial interests. The principle of assimilation had very little value in practice, because the Member States had no common definition on what constituted fraud and the degree of protection varied from state to state. Fortunately, the EU could now also act on EU fraud as it was no longer an exclusive competence of the Member States. But the pressing question arose about which instruments to use for protecting the financial interests in practice. Because since the Maastricht Treaty introduced the broadly known pillar structure of the EU, the Justice and Home Affairs area belonged to two different pillars. Justice and Home Affairs became the third pillar of the TEU but

²² Treaty on the European Union, 7 February 1992, *Official Journal of the European Communities*, C 191, 29 July 1992.

²³ Treaty establishing the European Economic Community, Rome, 25 March 1957, <http://www.cvce.eu/>, accessed on 22 April 2014.

²⁴ G. VERMEULEN, W. DE BONDT and C. RYCKMAN, *Rethinking international cooperation in criminal matters in the EU*, Antwerpen, Maklu, 2012, p. 42.

²⁵ Art. 280 (1) EC Treaty.

²⁶ Art. 280 (3) EC Treaty.

²⁷ Treaty of Amsterdam amending the Treaty on the European Union, the Treaties establishing the European Communities and certain related acts, Amsterdam, 2 October 1997, *Official Journal of the European Communities*, C 340, 10 November 1997.

²⁸ Consolidated version of the Treaty on the functioning of the European Union, *Official Journal of the European Union*, C 83, 30 March 2010.

remained an element of the EU's institutional and legal structure too, which belonged to the first pillar.

An artificial division of competences and instruments was the result: on the one hand, there were measures relating to anti-EU fraud, as a first pillar matter, that the EU could take by adopting supranational legislation. On the other hand, the combating of EU crime in general was a third pillar matter. The legislative measures touching upon these criminal matters are intergovernmental and exclusively the competence of the Member States.

In 1995 the European Commission, despite the opposition of the European Parliament which considered it necessary to act with the tools available in the first pillar, believed it was time to hold a convention on the protection of the financial interests, the PIF Convention.²⁹ Being a third pillar instrument, this required the ratification by all the Member States. However, at the time of writing only four Member States had ratified this convention.³⁰ The main achievements of the convention were that it set out a definition of fraud affecting the EU's financial interests and introduced the obligation for the Member States to make it a punishable offence and to cooperate.³¹ This convention is very important but because of the low ratification level it could not be implemented formally for many years.

Another third pillar measure aimed at combating EU fraud was the Convention on Europol of 1995³², a European police office which became fully operational in 1999. Europol promotes cooperation between the national police forces and other authorities, coordinates individual operations and provides specific expertise. Some authors have called the creation of Europol "*a silent revolution in the history of international police cooperation in Europe*".³³ Indeed, it is a revolution because Europol

²⁹ Council of the European Union, Act drawing up the convention on the protection of the European Communities' financial interests, 26 July 1995, *Official Journal of the European Communities*, C 316, 27 November 1995.

³⁰ Member States that ratified: Austria, Germany, Finland and Sweden.

³¹ Commission of the European Communities, Proposal for a Directive of the European Parliament and of the Council on the criminal-law protection of the Community's financial interests, COM (2001) 272 final, Brussels, 23 May 2001, *Official Journal of the European Communities*, C 240, 28 August 2001, p. 3.

³² Council of the European Union, Act drawing up the Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office, 26 July 1995, *Official Journal of the European Union*, C 316, 27 November 1995.

³³ C. FIJNAUT, "Transnational organized crime and institutional reform in the European Union: the case of judicial cooperation", in P. WILLIAMS and D. VLASSIS (eds.), *Combating Transnational Crime – Concepts, Activities and Responses*, 2001, p. 288.

established a supranational way of police cooperation. In 1997 the Treaty of Amsterdam gave Europol more broad policing tasks, such as the authority to request that Member States carry out and coordinate investigations and the power to create joint cross-border teams to assist those investigations. However, Europol's supranational character should not be overstated. Very few Member States were ready then to grant arrest powers to a supranational European police agency. And even if they were, the heterogeneity of criminal laws within the different Member States impeded the creation of a true supranational European police force.³⁴

Also, initiatives in the first pillar had been taken. The Council of the European Union adopted the Regulation of 1995³⁵, which was set up to provide a framework for the European Commission's action against fraud, but only through checks and administrative measures and penalties. This regulation was thus not sufficient. Besides, it was implemented fully by only five Member States.

The European Commission mapped out the need for supranational real action against the fraud problem. The intergovernmental approach was not appropriate because it lacked transparency and constituted a democratic deficit with minimum involvement of the European Parliament in the legislative process.³⁶ And after all, as AMBOS³⁷ put it, it is difficult to argue for the virtues of a criminal law restricted within the boundaries of the Member States if crime itself does not respect those boundaries.³⁸

³⁴ P. ANDREAS and E. NADELMANN, *Policing the globe: Criminalization and crime control in international relations*, Oxford University Press, 2006, p. 187.

³⁵ Council of the European Union, Regulation on the protection of the financial interests of the European Communities, 2988/95, 18 December 1995, *Official Journal of the European Communities*, L 312, 23 December 1995.

³⁶ E. HERLIN-KARNELL, "The Lisbon Treaty and the area of criminal law and justice", *European Policy Analysis*, April 2008, p. 2.

³⁷ Prof. Dr. Kai Ambos is Chair of criminal law, criminal procedure, comparative law and international criminal law at the Georg-August-Universität of Göttingen and head of the department of Foreign and International Criminal Law of the Institute of Criminal Law and Justice at the University of Göttingen.

³⁸ K. AMBOS, "Is the development of a common substantive criminal law for Europe possible? Some preliminary reflections", *Maastricht Journal of European and Comparative Law*, vol. 12, 2005, p. 174.

3. 1999-2007: intergovernmentalism cried victory

Although the Treaty of Amsterdam³⁹ provided the EU in 1997 with the required legal instruments to adopt legislative measures in the field of criminal justice, most post-Amsterdam initiatives represent the interest of enhancing the international cooperation between Member States rather than centralised policy solutions. In 1999 there was a European Council in Tampere⁴⁰ on the creation of an area of freedom, security and justice in the EU that functioned as an impulse to the JHA area. It pushed the cooperation in criminal matters in a new direction with the principle of mutual recognition of judicial decisions.⁴¹ Also, common priorities on investigations needed to be developed.⁴² Therefore a new unit, facilitating the proper cooperation between the national authorities, needed to be set up.⁴³ For the first time the possibility for setting up a Eurojust was mentioned.

Meanwhile, the European Commission's idea about supranational judicial action proceeded. Following the example of police cooperation through Europol, it suggested a supranational body for judicial cooperation as well: a European Public Prosecutor. This proposal was contained in a document that was the product of research and analysis carried out by a group of academics and practitioners⁴⁴: the Corpus Juris of 2000.⁴⁵ This research group was brought together by the European Commission in 1995 after numerous notorious fraud cases hit the media. The European Commission was frustrated as it was confronted with a day-to-day reality in which it had to release EU funds in situations where there were serious allegations of fraud but nothing could be proven due to the lack of adequate cooperation between the Member States.⁴⁶ Therefore the *Corpus Juris* group was asked

³⁹ Treaty of Amsterdam amending the Treaty on the European Union, the Treaties establishing the European Communities and certain related acts, Amsterdam, 2 October 1997, *Official Journal of the European Union*, C 340, 10 November 1997.

⁴⁰ European Parliament, Tampere European Council 15 and 16 October 1999, presidency conclusions, <http://www.europarl.europa.eu/>, accessed 4 April 2013.

⁴¹ See point B: A genuine European area of justice, VI: Mutual recognition of judicial decisions.

⁴² See point C: A Unionwide fight against crime, VIII: Preventing crime at the level of the union.

⁴³ See point C: A Unionwide fight against crime, IX: Stepping up cooperation against crime.

⁴⁴ This group is experienced in criminal law and led by M. Delmas-Marty. They worked on the *Corpus Juris* in the period of 1995-1996.

⁴⁵ Guiding Principles of *Corpus Juris* 2000, Florence, <http://ec.europa.eu/>, accessed 25 April 2013. This is the improved version of the original one in 1997.

⁴⁶ Eurojust News, issue 8, May 2013, p.3, <http://eurojust.europa.eu/>, accessed 15 April 2014.

to study the extent and nature of the fraud and to look at the question of whether the arrangements for the investigation and prosecution of cases of EU fraud were adequate enough. The answer to this question was negative and the solution set forward was the establishment of an EPPO, a straightforward vertical mechanism resembling national prosecution services in the Member States.

The Nice Intergovernmental Conference in 2000⁴⁷ confirmed that the protection of the EU's financial interests was essentially a first pillar matter. The European Commission together with the European Parliament considered it necessary to replace the current third pillar instruments with a supranational act adopted on the basis of Article 280 of the EC Treaty. The enthusiasm of the European Commission for a supranational EPPO made it subject of a proposal to the conference: adding a new Article 280bis to the EC Treaty to enhance protection of the EU's financial interests by establishing an EPPO. It was not taken up in the Treaty of Nice⁴⁸ because supposedly "*there was not enough time to consider the proposal*". The real reason that not the EPPO but an intergovernmental Eurojust was incorporated in the Nice Treaty was because the Member States were not ready for a supranational European Prosecutor. The EPPO came way ahead of its time. VAN DEN WYNGAERT⁴⁹ admits that the *Corpus Juris* group "*was well aware of the fact that in 1997 when the EPPO project was launched, it was engaging in some kind of political science fiction*".⁵⁰ NILSSON⁵¹ believes that this idea entered the EU agenda decades too early because "*it had been forgotten that Europe practically never creates anything as a Big Bang. New initiatives in the EU had always been step by step, through practical cooperation, pilot projects and trial and error*".⁵²

⁴⁷ Intergovernmental conferences are negotiations between the Member States' governments with a view to amending the Treaties. The IGC of the Treaty of Nice was launched in February 2000 to address the issues not resolved by the Treaty of Amsterdam.

⁴⁸ Treaty of Nice amending the Treaty on the European Union, the Treaties establishing the European Communities and certain related acts, Nice, 26 February 2001, *Official Journal of the European Communities*, C 80, 10 March 2001.

⁴⁹ Christine Van Den Wyngaert is a Belgian international and comparative criminal law expert, who has served as a judge at the International Court of Justice, the International Criminal Tribunal for the former Yugoslavia and since 2009 at the International Criminal Court. She was one of the members of the group of academics that drafted the *Corpus Juris*.

⁵⁰ Eurojust News, issue 8, May 2013, p. 3, <http://eurojust.europa.eu/>, accessed 15 April 2014.

⁵¹ Hans G. Nilsson is the head of the division of fundamental rights and criminal justice at the Council of the European Union.

⁵² H. G. NILSSON, "Judicial cooperation in the EU – Eurojust and the European Public Prosecutor", in E. GUILD, S. CARRERA and A. EGGENSCHWILER (eds.), *The Area of Freedom, Security and Justice Ten Years on: Successes and Future Challenges Under the Stockholm Programme*, Centre for European Policy Studies, 2011, p. 74.

So the Council of the European Union established in 2000 a provisional judicial cooperation unit named Pro-Eurojust⁵³ on the initiative of several Member States⁵⁴, who were urging for this body although there was no legal basis in a Treaty. This unit was the forerunner of Eurojust, where Eurojust's principles would be tried and tested by a board of prosecutors from all the Member States. Eurojust got a legal basis in the Treaty of Nice of 2001 and was formally established by the Council Decision of 28 February 2002.⁵⁵

The Member States clearly showed their aversion against a supranational EPPO.⁵⁶ Although disappointed, the European Commission never gave up its fight for an EPPO. In its Action Plan for 2001-2003⁵⁷, the European Commission put forward challenges for the EU concerning an overall anti-fraud policy. It is with regard to the last challenge, 'the strengthening of the criminal judicial dimension', that the creation of an EPPO was mentioned again. In subdivision 4.1 of the Action Plan, the European Commission states that "*although the EPPO proposal was not taken up at the Nice European Council, we will relaunch discussion on this proposal in the form of a Green Paper to be adopted by the end of 2001.*"

The Green Paper of 2001⁵⁸ aimed to ensure that this ambitious EPPO project became widely known throughout Europe and to respond to the scepticism towards the EPPO by explaining it in practical terms. New in this paper was the fact that the relationship between Eurojust and the EPPO is called complementary. Two years later in 2003, the European Commission published a follow-up report⁵⁹

⁵³ Council of the European Union, Decision setting up a provisional judicial cooperation unit, 2000/799/JHA, 14 December 2000, *Official Journal of the European Communities*, L 324, 21 December 2000.

⁵⁴ Portugal, France, Sweden and Belgium.

⁵⁵ Council of the European Union, Decision setting up Eurojust with a view to reinforcing the fight against serious crime, 2002/187/JHA, 28 February 2002, *Official Journal of the European Communities*, L 63, 6 March 2002.

⁵⁶ See the European Commission's Follow-up report on the Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, COM (2003) 128, 19 March 2003.

⁵⁷ Commission of the European Communities, Communication from the Commission Protecting the Communities' financial interests, Fight against fraud, Action Plan for 2001-2003, COM (2001) 254 final, Brussels, 15 May 2001, <http://eur-lex.europa.eu>, accessed 15 April 2013.

⁵⁸ Commission of the European Communities, Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, COM (2001) 715 final, Brussels, 11 December 2001, <http://ec.europa.eu/>, accessed 20 April 2013.

⁵⁹ Commission of the European Communities, Follow-up report on the Green Paper on the criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, COM (2003) 128 final, Brussels, 19 March 2003, <http://ec.europa.eu/>, accessed 20 April 2013.

with a summary of the answers from the different Member States on questions about the EPPO. The opinions were divided. Some countries such as Belgium, Greece, the Netherlands, Portugal and Spain were in favour of an EPPO, whilst others such as Austria, Denmark, Finland, France, Ireland and the UK were opposed. Germany, Italy, Luxembourg and Sweden still had certain doubts about the proposal.

Although important initiatives, the reality remained that nor the *Corpus Juris* nor the Green Paper were binding documents. The victory of intergovernmental judicial cooperation for the protection of the financial interests of the EU was an undeniable fact.

4. 2007-...: clear legal basis but dilemma

In 2005 the failed Constitutional Treaty resulted in a pause for reflection and retreat. The Lisbon Treaty⁶⁰, that followed the Constitutional Treaty in 2007, solved the competence problem in the JHA area by merging the three pillars. The Treaty brought the former third pillar areas into the core of the Union, thus allowing supranational judicial action and providing a significant increase of EU engagement in the field of criminal justice.⁶¹ Article 86 TFEU brought the establishment of an EPPO under discussion again⁶² in the EU.⁶³ From this moment on the debate on the EPPO had moved from theory to practice. But not only the creation of an EPPO got a legal basis in the TFEU, also the possible extension of Eurojust's powers was included in Article 85 TFEU.

These two articles have led to a wide debate about the type of institution that should be responsible for solving the problems in the prosecution of crimes against the financial interests of the EU. Those in favour of an intergovernmental way of cooperation support the further development of Eurojust's mandate, whilst the advocates of supranational action encourage the creation of the EPPO. Although this may seem to be a black-and-white situation, there are some who think that there is also a grey area: the strengthening of Eurojust and the setting up of an EPPO should go hand in hand.⁶⁴ Next

⁶⁰ Treaty of Lisbon amending the Treaty on the European Union and the Treaty establishing the European Community, Lisbon, 13 December 2007, *Official Journal of the European Union*, C 306, 17 December 2007.

⁶¹ <http://www.eppo-project.eu/>, accessed 25 April 2013.

⁶² Not that the European Commission ever left the idea of an EPPO, it simply stopped being a priority for several years.

⁶³ L. HAMRAN and E. SZABOVA, "European Public Prosecutor's Office – Cui bono?", *New Journal of European Criminal Law*, vol. 4, issue 1–2, Intersentia, 2013, p. 40.

⁶⁴ For more information on this, see *infra*, Chapter three: The desirability of the EPPO.

there will be an oversight of the different steps that have been taken at the EU level since these two articles saw the light.

4.1. Strengthening of Eurojust

The first important step was the Council Decision of 2008 about the strengthening of Eurojust⁶⁵, hereafter called the Revised Eurojust Decision. Although designed to expand the powers of Eurojust, the amendments introduced are relatively modest. Not the powers of the college of Eurojust but the powers of the national members as national authorities were strengthened. Given the fact that it is the college that takes the decisions, Eurojust's powers did not get more binding through this revised decision.⁶⁶

Later, in the Stockholm Programme of 2009⁶⁷, the European Council emphasises the need for further action to create a Europe of law and justice, *"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"*.⁶⁸ This leaves the question about the duality EPPO-Eurojust unanswered. The Stockholm Programme invited the European Commission to present an action plan.⁶⁹ The action plan foresees a legislative proposal to improve the functioning of Eurojust and to establish the EPPO.

So the European Commission proposed on 17 July 2013 a proposal for a Regulation on Eurojust.⁷⁰ According to the proposal, its objective is *"to use the opportunity offered by the Lisbon Treaty to modernise Eurojust by giving it an improved management structure that reduces the administrative burden currently placed on the College and allows it to focus on its core mission"*. However, in a

⁶⁵ Council of the European Union, 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, 2009/426/JHA, 16 December 2008, *Official Journal of the European Union*, L 138, 4 June 2009.

⁶⁶ Report Strategic Seminar, "Eurojust and the Lisbon Treaty: Towards more effective action", Bruges, 20-22 September 2010, *New Journal of European Criminal Law*, vol. 2, issue 1, 2011, p. 104.

⁶⁷ A five-year plan with guidelines for JHA to the Member States for the years 2010-2014.

⁶⁸ European Council, The Stockholm Programme – An open and secure Europe serving and protecting citizens, 4 May 2010, *Official Journal of the European Union*, C 115, 4 May 2010, p. 13.

⁶⁹ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Delivering an area of freedom, security and justice for Europe's citizens - Action Plan Implementing the Stockholm Programme, COM (2010) 171 final, Brussels, 20 April 2010, <http://eur-lex.europa.eu/>, accessed 25 April 2013.

⁷⁰ European Commission, Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Criminal Justice Cooperation (Eurojust), COM (2013) 535 final, Brussels, 17 July 2013, <http://eur-lex.europa.eu/>, accessed on 14 November 2013.

recently held seminar in 2013 on a new draft Regulation on the extension of Eurojust⁷¹, the proactive dimension of Eurojust's mandate was widely supported. It is remarkable that the majority of the participants⁷² in the seminar are satisfied with Eurojust's current competence and are of the opinion that its principal strength lies within its coordination role.

4.2. Establishing the EPPO

In April 2010 the European Commission presented its Action Plan for 2010-2014, implementing the Stockholm Programme, in which it stated that it will prepare for the establishment of an EPPO which has the responsibility to investigate, prosecute and bring to judgement offences against the EU's financial interests. The European Commission announced that its proposal for a regulation on the EPPO is expected in 2013. The European Parliament always supported the idea of an EPPO so in its Resolution of May 2010, it called upon the European Commission to begin early discussions and consultations with interested stakeholders related to the creation of an EPPO and to step up the adoption of all necessary measures for establishing this office.⁷³

In May 2011, the European Commission adopted a Communication⁷⁴ which emphasises the need to improve the protection of the financial interests of the EU and to fully use the opportunities enshrined in the Lisbon Treaty. It mentions that *"a specialised European prosecution authority such as the EPPO could contribute to establishing a common level playing field by applying common rules on fraud and other offences against the financial interests of the Union in a consistent and homogeneous way"*.⁷⁵

In 2010 the European Commission funded the EPPO research project, a series of three studies that have been conducted by a group of European criminal law experts at the University of Luxembourg

⁷¹ Eurojust seminar on new draft Regulation, "An improvement in the fight against cross-border crime?", Press release, The Hague, 16 October 2013, <http://eurojust.europa.eu/press/PressReleases/Pages/2013/2013-10-16.aspx>, accessed 13 November 2013.

⁷² A combination of academic and practitioner perspectives and viewpoints from more than 150 representatives of the 28 Member States and EU institutions.

⁷³ European Parliament, Resolution on the protection of the Communities' financial interests and the fight against fraud - Annual Report 2008, 2009/2167 (INI), Brussels, 6 May 2010, <http://www.europarl.europa.eu/>, accessed 15 November 2013.

⁷⁴ European Commission, Communication from the European Commission to the European Parliament, the Council, the European economic and social committee and the committee of the regions on the protection of the financial interests of the European Union by criminal law and by administrative investigations – An integrated policy to safeguard taxpayers' money, COM (2011) 293 final, Brussels, 26 May 2011, <http://ec.europa.eu/>, accessed 15 November 2013.

⁷⁵ *Ibid*, p. 11.

under the leadership of Professor Katalin Ligeti⁷⁶. From 2010 until 2012, these experts did a study on the EU model rules for the procedure of the EPPO. A comparative law study of the 29⁷⁷ national systems of investigation, prosecution and procedural safeguards was conducted, leading to elaborating model rules of supranational prosecution.⁷⁸

These Draft model Rules of 2012 triggered a proposal from the European Commission for a Council Regulation in 2013⁷⁹, which seeks to set up the EPPO and define its competence and procedures. In order to prepare this proposal, the European Commission has consulted widely with stakeholders and builds further on earlier discussions related to different aspects of the EPPO. This proposal complements an earlier legislative proposal of 2012 for a Directive on the fight against fraud on the Union's financial interests⁸⁰ which defines the criminal offences as well as the applicable sanctions and thereby constitutes the substantive basis for the offences within the EPPO's competence.

III. Conclusion

Since the beginning of the EU it has been clear that Member States are reluctant to give up parts of their sovereignty in every policy area. As the crimes against the financial interests of the EU increased, the awareness grew of the fact that purely national tackling of EU fraud is far from sufficient. But on the question as to which action would be more desirable, intergovernmental or supranational, is still no clarity in sight. For years the debate went on, starting with intergovernmental action with no legal basis for supranational action, to more supranational initiatives.

Even though the new supranational initiatives seemed promising, they did not represent a true revolution because Member States were not ready yet to give up their powers. That is why after the Tampere Council, a clear choice was made in 2000 for the setting up of an intergovernmental Pro-

⁷⁶ Katalin Ligeti is a Professor of European and international criminal law at the University of Luxembourg, and secretary-general of the International Association of Penal Law.

⁷⁷ There were 27 EU Member States, but the UK has three different legal systems: England and Wales, Northern Ireland, and Scotland.

⁷⁸ K. LIGETI, Model Rules for the Procedure of the EPPO, <http://www.eppo-project.eu>, accessed 25 November 2013.

⁷⁹ European Commission, Proposal for a Council Regulation on the establishment of a European Public Prosecutor, COM (2013) 534 final, Brussels, 17 July 2013, <http://eur-lex.europa.eu/>, accessed 15 November 2013.

⁸⁰ European Commission, Proposal for a Directive of the European Parliament and of the Council on the fight against fraud on the Union's financial interests by means of criminal law, COM (2012) 363 final, Brussels, 11 July 2012, <http://eur-lex.europa.eu/>, accessed 15 November 2013.

Eurojust, which was contrary to the European Commission's proposal of a supranational EPPO founded in the *Corpus Juris*. The idea of an EPPO shortly moved to the bottom of the EU's agenda but did certainly not disappear. The Lisbon Treaty provided a legal basis for the EPPO in Article 86 TFEU. The yearlong debate however was still not solved, as this Treaty also foresaw in Article 85 TFEU a legal basis for the strengthening of an already existing intergovernmental EU body, Eurojust. Since then, initiatives for both the strengthening of Eurojust and the creation of an EPPO have been taken.

To conclude, it is safe to say that the contrast between intergovernmentalism and supranationalism has always existed. In the history of EU criminal policy it was mostly the intergovernmental action that prevailed but a supranational voice was never far away. So even though the idea of an EPPO has currently become a hot topic at EU level, it is incorrect to call this a huge revolution. Not a novelty, but a somewhat silently present idea it should be called, seeing it is since the *Corpus Juris* in the 1990's of last century that the EPPO idea got shape.

But although it might seem as though the EPPO is the logical step forward in an evolution that has been proceeding for years, it cannot be denied that there have always been a lot of critiques and doubts about this proposal. One aspect in particular should be brought to the attention of the reader: the ever-contested opposition between a strengthened Eurojust and the EPPO, a prolongation of the intergovernmental vs. supranational debate. Consequently it is time to pass onto the following research questions. Contested for years and now seemed to be the next logical step forward, but the question now to be answered is whether the EPPO is really a necessity.

Chapter two: The need for an EPPO

- Subsidiarity test -

“If you have a federal budget – with money coming from all EU Member States and administered under common rules – then you also need federal instruments to protect this budget effectively across the Union.”

European Commission, 2013.⁸¹

When proving the need for an EPPO, the subsidiarity test is essential. This test triggers four research questions. The first two parts set out the problems in the current prosecuting situation of fraud against the financial interests of the EU. Firstly, some numbers of EU fraud will be set out to demonstrate the need for intervention. Secondly, after establishing that the EU budget suffers great losses due to financial crimes, the deficiencies that cause these damages will be analysed. It must be emphasized that these first two parts revolve around the general problems in this area, without proving the fact that the EPPO would be the only solution to this. Although this is a chapter about the need for an EPPO, it must first be demonstrated that the current situation is no longer sustainable.

After having proven the difficulties in the current prosecuting situation, the EPPO as a specific solution will be set forward. The following two parts aim to find out whether the Member States and the existing EU bodies are sufficient to work out the current problems or whether the EPPO is needed for this. This represents the core of the subsidiarity test: first it must be demonstrated that the objectives of the EPPO proposal cannot be sufficiently achieved at Member State level. In the second part of the subsidiarity test it must be proven that the objectives of the proposal can be better achieved at EU level by reason of their scale and effects. This is called the ‘EU added value-test’.

⁸¹ European Commission, “Protecting taxpayers’ money against fraud: European Commission proposes European Public Prosecutor’s Office and reinforces OLAF procedural guarantees”, IP/13/709, Brussels, 17 July 2013, http://europa.eu/rapid/press-release_IP-13-709_en.htm, accessed 11 November 2013.

I. Damage to the EU budget: intervention is needed

Criminal offences against the financial interests of the EU are offences like fraud, smuggling, corruption and money laundering. In specific, it often involves criminals who deliberately provide false information to receive EU funding, national officials who accept money in return for awarding a public contract, EU subsidies or regional aid not being used for what it is envisaged⁸², and so on. Those offences generate important economic and social costs and lead to the loss of € 500 million each year, of which below 10% is ever recovered.⁸³

Some Member States and practitioners say that there is not a sufficient amount of available statistics on EU fraud and even if there are statistics, that they do not provide satisfying evidence that there is a large number of these offences.⁸⁴ But even though it is correct that there is only partial data available, there are several arguments as to why the real amount of fraud is likely to be even higher and adds up to € 3 billion a year.⁸⁵ This is called the 'iceberg analogy': the reported fraud is only the tip of the iceberg of the total amount of EU fraud. First of all, this number of € 500 million each year is based on the reported fraud, so undetected fraud is not included. Secondly, the reported numbers are incomplete, which is a result from the varying reporting behaviour by the Member States. There are many reasons as to why Member States might under-report fraud, including the need to maintain business confidence, fear of fraudsters and their allies in national administrations, the feeling that reporting fraud is not worth the candle, and widespread corruption.⁸⁶ Thirdly, the Member States are only obliged to report irregularities exceeding € 10.000, so that suspicious cases below this threshold are unknown at EU level.⁸⁷

The amount of fraud cases should thus not be underestimated and is actually rising every year. In the OLAF report of 2013 is stated that the irregularities of 2012 transcend those of 2011. The

⁸² Seeing the EU budget can be used only for implementing the policies which the EU legislator has approved.

⁸³ European Commission, 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, Brussels, 17 July 2013, p. 24, <http://ec.europa.eu/>, accessed 4 May 2013.

⁸⁴ K. LIGETI and M. SIMONATO, "The European Public Prosecutor's Office: Towards a Truly European Prosecution Service?", *New Journal of European Criminal Law*, vol. 4, issue 1-2, 2013, p. 8.

⁸⁵ UK House of Commons – European Scrutiny Committee, "European Public Prosecutor's Office: Reasoned Opinion, Reform of Eurojust, European Anti-Fraud Office", fifteenth report of session 2013-14, published 17 September 2013, p. 5, <http://www.publications.EuropeanParliament.uk/>, accessed 4 December 2013.

⁸⁶ A. WILLIAMS, "Fighting fraud in the EU: a note on icebergs and evidence", *ERA Forum*, 2013, p. 228.

⁸⁷ K. LIGETI and M. SIMONATO, "The European Public Prosecutor's Office: Towards a Truly European Prosecution Service?", *New Journal of European Criminal Law*, vol. 4, issue 1-2, 2013, p. 9.

irregularities reported as fraudulent in 2012 cost the Union € 315 million, which is an increase of € 20 million compared to the € 295 million in 2011.⁸⁸ But although the damage is significant, the prosecution and conviction of offences against the EU's financial interests leave a lot to be desired. Member States have under Article 325 TFEU a specific obligation to counter crimes against the financial interests of the EU and afford effective protection to those interests. Especially in the aftermath of the financial crisis, one would expect the Member States to tackle these fraud cases efficiently and cooperate with each other to prevent fraudsters from forum shopping⁸⁹. These expectations however are not fulfilled. Member States are often not eager or equipped to handle cases of EU fraud and in the next part it will become clear why.

II. Problems in the current prosecution of crimes against the financial interests of the EU

There are two main problems in the current prosecution of crimes against the financial interests of the EU that make the current situation no longer sustainable. First of all, the rate of prosecutions varies considerably from one Member State to another, where some Member States punish one crime with imprisonment whilst others take no action for that same type of crime.⁹⁰ This invites criminals to go forum shopping. Also the low level of prosecution of crimes against the financial interests of the EU is a serious issue. With an EU average of only 42.3%⁹¹ and thus leaving many cases unprosecuted, the EU allows fraudsters to exploit legal loopholes and to illegally pocket EU citizens' money. A sense of impunity is amongst fraudsters, leading to a low level of deterrence.

1. Varying prosecution level -> forum shopping

Article 325 TFEU holds the obligation for the Member States to *"take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests"*. This means that Member States need to tackle EU fraud in a way which is analogous to similar national provisions. Consequently, whilst all the Member States penalise the

⁸⁸ OLAF, "Fraud in figures – Results of OLAF's work", http://ec.europa.eu/anti_fraud/investigations/fraud-in-figures/, accessed 3 December 2013.

⁸⁹ 'Forum shopping': the informal name given to the practice adopted by some litigants to commit their crime or have their legal case in the Member State thought most likely to provide a favourable law or judgment.

⁹⁰ European Commission, "Protecting taxpayers' money against fraud: European Commission proposes European Public Prosecutor's Office and reinforces OLAF procedural guarantees", IP/13/709, Brussels, 17 July 2013, http://europa.eu/rapid/press-release_IP-13-709_en.htm, accessed 27 October 2013.

⁹¹ The Olaf Report 2011, Twelfth operational report of the European Anti-fraud Office, 1 January to 31 December 2011, p. 22, http://europa.eu/rapid/press-release_IP-13-709_en.htm, accessed 3 December 2013.

main types of fraudulent acts, significant differences remain with regard to the substantive law, relevant procedures and practical application.⁹² Police, prosecutors and judges in the different Member States all take varying investigation and prosecution measures, leading to a varying rate of conviction of EU fraudsters. This will be set out in table 1 below.

The fact that there is no common level playing field at criminal law level in the EU results in a patchy legal framework. Despite the attempts to provide for minimum standards in this field, the situation has not changed noticeably and still 30⁹³ different national laws apply. The different ways and means to tackle a single reality in all the Member States make it hardly appropriate to tackle the complex cases which by their nature go beyond the national context and require more than a national response. Because of the differing outcomes in similar individual cases, the deterrent effect of prosecutions and convictions varies widely across the EU. This creates the possibility for criminals to choose where to operate criminal activity or to move elsewhere after the commission of the offence.

⁹² N. MARTYN, "Community fraud – an analysis of the phenomenon", in F. TULKENS, C. VAN DEN WYNGAERT and I. VEROUGSTRAETE, *De juridische bescherming van de financiële belangen van de Europese gemeenschappen*, Antwerpen, Maklu, 1992, p. 42.

⁹³ There are currently 28 EU Member States, but the UK has three different legal systems: England and Wales, Northern Ireland, and Scotland.

Table 1: Overview of judicial action in cross-border fraud cases forwarded by OLAF by 27 Member States from 2006-2011⁹⁴

Country	Actions transferred to MS					Results					
	Actions transferred to MS	Actions pending judicial decision	As % of all actions transferred	Actions with judicial decision	As % of all actions transferred	Dismissed before trial	Dismissals as % of results	Aquittal	Aquittals as % of results	Convictions	Convictions as % of results
Austria	8	4	50.0 %	4	50.0 %	0	0.0 %	0	0.0 %	4	100.0 %
Belgium	56	28	50.0 %	28	50.0 %	10	35.7 %	0	0.0 %	18	64.3 %
Bulgaria	37	23	62.2 %	14	37.8 %	6	42.9 %	2	14.3 %	6	42.9 %
Cyprus	1	1	100.0 %	0	0.0 %	0	NA	0	NA	0	NA
Czech Republic	23	15	65.2 %	8	34.8 %	6	75.0 %	0	0.0 %	2	25.0 %
Denmark	4	1	25.0 %	3	75.0 %	2	66.7 %	0	0.0 %	1	33.3 %
Estonia	3	2	66.7 %	1	33.3 %	0	0.0 %	0	0.0 %	1	100.0 %
Finland	12		0.0 %	12	100.0 %	1	8.3 %	0	0.0 %	11	91.7 %
France	29	17	58.6 %	12	41.4 %	3	25.0 %	0	0.0 %	9	75.0 %
Germany	168	54	32.1 %	114	67.9 %	37	32.5 %	12	10.5 %	65	57.0 %
Greece	86	60	69.8 %	26	30.2 %	14	53.8 %	7	26.9 %	5	19.2 %
Hungary	10	9	90.0 %	1	10.0 %	1	100.0 %	0	0.0 %	0	0.0 %
Ireland	0	0	NA	0	NA	0	NA	0	NA	0	NA
Italy	112	75	67.0 %	37	33.0 %	21	56.8 %	2	5.4 %	14	37.8 %
Latvia	4	4	100.0 %	0	0.0 %	0	NA	0	NA	0	NA
Lithuania	9		0.0 %	9	100.0 %	1	11.1 %	0	0.0 %	8	88.9 %
Luxembourg	2	1	50.0 %	1	50.0 %	0	0.0 %	0	0.0 %	1	100.0 %
Malta	5	5	100.0 %	0	0.0 %	0	NA	0	NA	0	NA
Netherlands	29	13	44.8 %	16	55.2 %	11	68.8 %	0	0.0 %	5	31.3 %
Poland	90	73	81.1 %	17	18.9 %	9	52.9 %	2	11.8 %	6	35.3 %
Portugal	21	12	57.1 %	9	42.9 %	3	33.3 %	0	0.0 %	6	66.7 %
Romania	225	97	43.1 %	128	56.9 %	94	73.4 %	4	3.1 %	30	23.4 %
Slovakia	16	7	43.8 %	9	56.3 %	8	88.9 %	1	11.1 %	0	0.0 %
Slovenia	2	2	100.0 %	0	0.0 %	0	NA	0	NA	0	NA
Spain	54	49	90.7 %	5	9.3 %	5	100.0 %	0	0.0 %	0	0.0 %
Sweden	5	1	20.0 %	4	80.0 %	0	0.0 %	0	0.0 %	4	100.0 %
United Kingdom	19	6	31.6 %	13	68.4 %	9	69.2 %	1	7.7 %	3	23.1 %
Total	1 030	559	54.3 %	471	45.7 %	241	51.2 %	31	6.6 %	199	42.3 %

Table 1 shows that conviction rates vary widely with an average of 42%.⁹⁵ For the most diversified numbers we can cite Slovakia, Spain and Hungary that netted zero convictions between 2006 and 2011. Austria, Estonia, Luxembourg, Sweden and Finland landed between 91% and 100% conviction

⁹⁴ The Olaf Report 2011, Twelfth operational report of the European Anti-fraud Office, 1 January to 31 December 2011, p. 22, http://europa.eu/rapid/press-release_IP-13-709_en.htm, accessed 26 November 2013.

⁹⁵ European Commission, Communication from the European Commission to the European Parliament, the Council, the European economic and social committee and the committee of the regions on the protection of the financial interests of the European Union by criminal law and by administrative investigations – An integrated policy to safeguard taxpayers’ money, COM (2011) 293 final, Brussels, 26 May 2011, p. 5, <http://ec.europa.eu/>, accessed 27 November 2013.

rates.⁹⁶ These varying conviction rates indicate that not every Member State takes equal investigation/prosecution measures.

The question arises as to why the conviction rates differ from 0% up to 100%. According to the European Commission there are still some important impediments to an equivalent policy for crimes against the financial interests of the EU. Firstly, there is a wide variation in definitions of criminal offences, in the sanctions which those offences attract and in time limitations. Secondly, the concept of public official in relation to anti-corruption rules varies. This leads to cases of impunity in some Member States, whereas in others conviction for the same behaviour would result in a penal sanction and removal from public office. Thirdly, the controversy about Corporate Criminal Liability leads to the situation that in some Member States the heads of businesses and legal persons can be held criminally liable for criminal conduct on behalf of the company, while in others they cannot.⁹⁷ Fourthly, it is a fact that competent authorities of Member States do not always have sufficient legal means at their disposal and appropriate structures in place to adequately prosecute cross-border cases. Consequently, some national judicial authorities are able to open proceedings more extensively while others have to do so more restrictively.

2. Low prosecution level -> impunity

There are several explanations for the low average conviction rate of 42.3%.⁹⁸ Above all it is the Member States' sense of irresponsibility towards the financial interests of the EU. Because there is no real ownership of the EU budget, Member States are often unwilling to protect it because they are essentially trying to recover the Union's money, not their own. Member States feel like it is a waste of their national resources to prosecute crime against a budget shared between 27 other Member States. This could be considered as a form of 'tragedy of the commons'. Indeed, it is the reality in most Member States that national police and prosecutors will be called to account by their

⁹⁶ N. NIELSEN, "EU-wide prosecutor to launch own criminal investigations", 17 July 2013, <http://euobserver.com/justice/120895>, accessed 5 December 2013.

⁹⁷ European Commission, Communication from the European Commission to the European Parliament, the Council, the European economic and social committee and the committee of the regions on the protection of the financial interests of the European Union by criminal law and by administrative investigations – An integrated policy to safeguard taxpayers' money, COM (2011) 293 final, Brussels, 26 May 2011, p. 6-7, <http://ec.europa.eu/>, accessed 20 February 2014.

⁹⁸ The Olaf Report 2011, Twelfth operational report of the European Anti-fraud Office, 1 January to 31 December 2011, p. 22, http://europa.eu/rapid/press-release_IP-13-709_en.htm, accessed 21 March 2014.

government if they fail to tackle national fraud but that the government will not call upon the authorities if they put the cases of EU fraud at the bottom of their work-pile.⁹⁹

It must be brought to the attention that some cases of EU fraud do not encompass a cross-border element and can in principle be confined to one single Member State, so that a national approach is suitable. In these strictly national cases there are several reasons that explain the low prosecution rates of EU fraud, which will be set out below in part 2.2. On the other hand, there are a large number of trans-European cases which will first be treated in part 2.1 since they represent the majority of the offences against the financial interests of the EU, or as LIGETI claims: “*PIF offences are less and less limited to one Member State and more and more have a cross border dimension*”.¹⁰⁰

2.1. Trans-European cases of EU fraud

2.1.1. Paradox: more cross-border crimes vs. low prosecution rates

Since EU funding rules became less strict, the financial crimes with a cross-border dimension have been steadily increasing. This becomes clear when looking at the number of cases referred to Eurojust by the Member States for coordination and advice. Diagram 1 below points out that since Eurojust’s creation in 2002, when there were only 202 cases forwarded, the number increased to 1372 cases in 2009.¹⁰¹ Further in the Annual Report of 2012 of Eurojust, it is visible that the number of cases in which Member States requested Eurojust’s assistance increased with 6.4% from 2011 to 2012. This provides an indication on how the cross-border cases were growing and how challenging they were for Member States, who requested the assistance and advice of Eurojust.

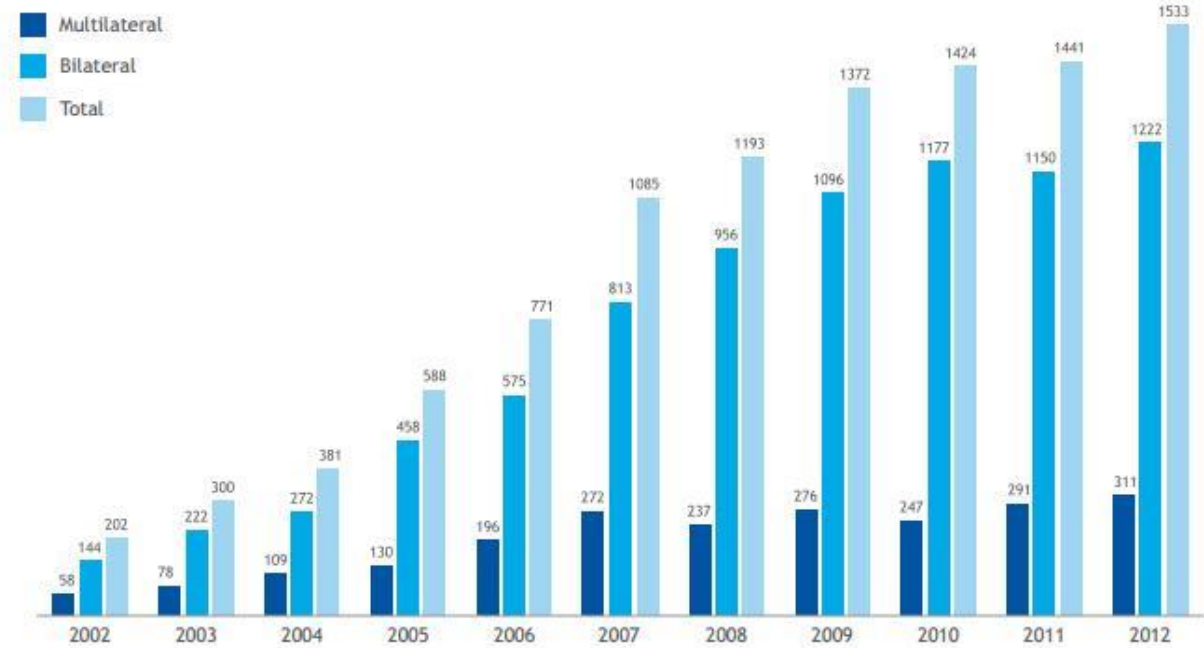
The increasing number of cross-border crimes together with the decreasing prosecution rates is paradoxical and creates a dangerous situation of no deterrence towards criminals.

⁹⁹ A. KLIP, “Een Europees Openbaar Ministerie”, Ed., *DD*, 2013, afl. 9, p. 649.

¹⁰⁰ K. LIGETI, “Do we need the EPPO?”, presentation at the University of Luxembourg (Faculty of law, economics and finance), www.eucriminallaw.com, accessed 25 March 2014.

¹⁰¹ Eurojust, Annual Report 2009, p. 50, <http://eurojust.europa.eu/>, accessed 26 April 2013.

Diagram 1: Number of cases transferred to Eurojust from 2002-2012¹⁰²



2.1.2. Reasons for low prosecution/conviction rates

In its Staff Working Paper of 2011 the European Commission did a research as to what the main reasons are for Member States to dismiss a case of fraud against the financial interests of the EU that was transferred by OLAF. This is set out in table 2.

¹⁰² Eurojust, Annual Report 2012, p. 57, <http://eurojust.europa.eu/>, accessed 27 April 2013.

Table 2: Main reasons for Member States' dismissals before trial¹⁰³

Member State	Lack of evidence	Prescription	No Public Interest	No legal basis	Low priority	Procedural errors	Other	Unspecified	Total
1	0	0	0	0	0	0	0	0	0
2	1	0	0	0	0	0	1	0	2
3	3	0	0	0	0	0	0	0	3
4	0	1	0	2	0	0	1	2	6
5	8	6	3	2	0	0	3	1	23
6	9	1	0	0	0	0	3	0	13
7	22	8	1	2	0	0	7	3	43
8	6	0	0	0	0	0	1	0	7
9	85	13	26	0	9	0	19	0	152
10	1	0	0	0	0	0	0	0	1
11	0	0	1	0	0	0	0	0	1
12	12	0	0	0	1	0	1	0	14
13	16	0	1	0	2	4	9	0	32
14	8	0	0	2	1	0	0	0	11
15	11	4	1	0	12	0	1	3	32
16	4	1	0	1	0	0	2	0	8
17	2	0	1	0	0	0	0	0	3
18	1	0	0	0	0	0	0	0	1
19	36	66	0	3	0	0	6	5	116
20	29	4	25	39	1	0	2	15	115
21	5	0	0	1	0	0	0	2	8
22	34	5	0	0	0	0	2	4	45
23	3	0	0	0	0	0	0	0	3
24	2	0	0	6	0	0	0	0	8
25	0	0	0	0	0	0	0	0	0
26	0	0	0	0	0	0	0	0	0
27	0	0	0	0	0	0	0	0	0
Total	298	109	59	58	26	4	58	35	647

The numbers in table 2 show that 72.5% of dismissed cases are closed for mandatory reasons, like the lack of evidence and prescription. 27.5% of dismissals are closed for discretionary reasons, like the fact that the case is of low priority or has no public interest. In this Staff Working Paper national prosecutors specialised in financial interests were interviewed and they stated that it is the European dimension of crimes that is the basis of these dismissals. It appears that 40% of the national prosecutors of financial crimes deals with disincentives in national law for handling European cases. 54% sometimes limits their investigations to the national elements. 37% has already decided not to contact an EU institution in relevant cases, mainly because it was time-consuming.¹⁰⁴

¹⁰³ European Commission, Commission Staff Working Paper to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Accompanying the document Communication from the Commission on the protection of the financial interests of the European Union by criminal law and by administrative investigations: An integrated policy to safeguard taxpayers' money, SEC (2011) 621 final, Brussels, 26 May 2011, p. 9, <http://eur-lex.europa.eu/>, accessed 4 May 2013.

¹⁰⁴ European Commission, Communication from the European Commission to the European Parliament, the Council, the European economic and social committee and the committee of the regions on the protection of

Also, when national prosecutors of financial crimes were asked in the Euroneeds study from 2007-2013 whether they thought the European dimension of cases was hampering, the majority answered this question affirmative. This is set out in table 3.

Table 3: Opinions of national prosecutors of financial crimes on the hampering effect of the European dimension of cases¹⁰⁵

Are such investigations hampered by the European dimension i.e. do they fail because of it (substantive and or procedural legal or practical complexity - is the necessity to rely on evidence to be found in another MS a bar)?		
Answer	Count	Percentage
No (1)	14	40.00%
Yes - Legal problems (2)	12	34.29%
Yes - Procedural problems (3)	12	34.29%
Yes - Practicalities (4)	17	48.57%
Yes - Other (5)	1	2.86%

Table 3 shows that a majority estimates that the European dimension is indeed a hampering factor for the prosecution of financial crimes, mostly because of the practicalities but also because of legal and/or procedural problems. The question arises as to what exactly these problems are that a cross-border dimension entails.

The answer to the abovementioned question is explained with a hypothetical example: an organisation of Spanish nationals specialised in cross-border VAT fraud has acted through Belgium and France to illegally obtain EU funds. This illegal money was laundered through the commercial sector in Germany. The members of this organisation resided in an Italian villa with a false name. A cross-border dimension like this can lead to two possible problems causing low levels of prosecution. Firstly, a case that involves two or more Member States can lead to conflicts of jurisdiction. This leads to a lack of prosecution in the case of negative conflicts of jurisdiction or to a delayed prosecution because positive conflicts of jurisdiction entail time-consuming consultations and dispute settlements. Secondly, there are several deficiencies in the international cooperation between Member States, such as problems with evidence, national disincentives and lack of power of the

the financial interests of the European Union by criminal law and by administrative investigations – An integrated policy to safeguard taxpayers’ money, COM (2011) 293 final, Brussels, 26 May 2011, p. 4, <http://ec.europa.eu/>, accessed 20 February 2014.

¹⁰⁵ M. WADE, “Evaluating the need for and the needs of a European Criminal Justice System”, EuroNEEDs study, Max-Planck-Institut für ausländisches und internationales Strafrecht, Co-funded by the European Commission and OLAF, 2007-13, p. 19-20.

existing EU bodies.¹⁰⁶ Finally, it will be demonstrated in part 2.1.3 how it would be better to start approximating the national laws than to keep expanding the conditions for cooperation.

1) *Conflicts of jurisdiction*

In cross-border criminal matters there is no standard set of agreed rules to determine which state has jurisdiction. The commencement of criminal proceedings is a sovereign right, so that every Member State decides for itself whether it starts investigating and prosecuting a case. Negative conflicts of jurisdiction arise when none of the Member States concerned is willing to investigate and prosecute the offenders and protect the rights of victims.¹⁰⁷ The fact that these negative conflicts of jurisdiction lead to low prosecution rates is obvious and needs no further clarification.

There is on the other hand a positive conflict of jurisdiction when several Member States establish prosecutorial jurisdiction for the same crime. Like in the abovementioned example, the following Member States could hypothetically consider themselves competent for prosecution: Spain when it operates on the principle of active personality, because the members of the organisation are Spanish. Belgium and France can consider themselves competent as it was on their territory that the crimes were committed. Also Germany as the country in which the money laundering took place, can be considered competent. Lastly, Italy could also be competent when working with the principle of territorial competence as the members of the organisation have their ordinary residence there.

Member States are often not aware from each other that they have started investigations simultaneously. And even if they are, they are often reluctant to transfer the case to another Member State. One can think of both advantages and disadvantages of these parallel investigations. The advantage is that because there are more Member States and thus more research capacity involved, there is more thorough information. The disadvantage is obviously that there is a pressing need for coordination because the principle of *non bis in idem*¹⁰⁸ prevents the suspect from being

¹⁰⁶ A. GUTIÉRREZ-ZARZA, “Eurojust – The European Union’s Judicial Cooperation Unit”, presentation at Eurojust, The Hague, 11 December 2013.

¹⁰⁷ G. COFFEY, “Resolving conflicts of jurisdiction in criminal proceedings: interpreting ne bis in idem in conjunction with the principle of complementarity”, *New Journal of European Criminal Law*, vol. 4, issue 1-2, 2013, p. 60.

¹⁰⁸ Latin for “*Not twice in the same case*”: no one shall be prosecuted or tried twice for the same facts. This principle is a fundamental constitutional right and is respected by international human rights conventions. It is the basis of mutual recognition because instead of prosecuting and trying the criminal several times in different Member States, the decision of the first Member State needs to be recognized (and where necessary enforced) in the other Member States as if it was a decision of their own.

prosecuted or tried twice for the same fact.¹⁰⁹ Up to the stage of investigations it is permitted that two or more Member States take investigative measures. But in the stage of prosecution and trial, this *non bis in idem* principle fully applies, leading to the obligated transfer of proceedings to the country that is considered the best place for prosecution.

Conflicts of jurisdiction must be avoided, as stated in Article 82 (1, b) TFEU: “*The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to: ... (b) prevent and settle conflicts of jurisdiction between Member States*”. The *non bis in idem* principle only prevents a second prosecution post-factum but it does not prevent the conflicts of jurisdiction in se, as it is only applicable from the moment there is a second prosecution/trial. In fact this principle can lead to arbitrary results: the choice of jurisdiction is left to chance because giving preference to the jurisdiction that first takes a final decision, amounts to a ‘first come first served’ principle. According to the European Commission in its Green Paper of 2005 an adequate response to the problem of positive conflicts of jurisdiction is to create a mechanism for allocating cases to an appropriate jurisdiction, which would complement the principle of mutual recognition.¹¹⁰

In 2009, a mechanism for the prevention and settlement of conflicts of jurisdiction is provided by a Framework Decision of the Council.¹¹¹ Article 5 (1) of this Framework Decision, hereafter ‘FD’, states that competent national authorities shall contact each other when they have reasonable grounds to believe that parallel proceedings are being conducted in another Member State. It is clear in the wording of Article 12 (2) that Eurojust is chosen as a mediator because where it is not possible to reach consensus amongst the Member States, the matter shall be referred to Eurojust if it is competent to act under Article 4(1) of the Eurojust Decision.

However, the FD has several shortcomings. Firstly, since FD’s have no direct effect and leave it entirely up to the Member States to achieve the results, the conflicts of jurisdiction still occur too often. Secondly, the FD only focuses on the regulation of the settlement of conflicts of jurisdiction but it does not determine a procedure for the transfer of criminal proceedings. In this regard,

¹⁰⁹ In the infamous Gözütok & Brügge case of 2003, the European Court of Justice ruled that even a decision of non-prosecution can count for a *non bis in idem* situation. This decision has a direct influence – Gözütok & Brügge, 11 February 2003, C-187/01 & C-385/01, <http://curia.europa.eu/>, accessed 24 February 2014.

¹¹⁰ Commission of the European Communities, Green Paper on Conflicts of Jurisdiction and the Principle of *non bis in idem* in Criminal Proceedings, COM (2005) 696 final, Brussels, 23 December 2005, p. 3, <http://eur-lex.europa.eu/>, accessed 25 February 2014.

¹¹¹ Council of the European Union, Framework Decision on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, 2009/948/JHA, 30 November 2009, *Official Journal of the European Union*, L 328, 15 December 2009.

Member States have to apply the Convention of the Council of Europe on the Transfer of Proceedings in Criminal Matters of 15 May 1972. But this convention is out dated and was ratified by only 13 Member States, so it is rarely used. So currently the transfer of criminal proceedings is not regulated at EU level and is a time-consuming procedure. In 2009, there was a proposal for a Framework Decision on the transfer of criminal proceedings¹¹² by 16 Member States that was supposed to replace the Council of Europe Convention of 1972. As there was no unanimity, there has not been a continuation of this proposal so far. Although this FD on the transfer of criminal proceedings is not established, the fact that a majority of 16 Member States proposed this proves the pressing need for an instrument that provides a common framework on the transfer of criminal proceedings.

The third shortcoming of the FD of 2009 is the fact that it does not establish a compulsory set of criteria to solve conflicts of jurisdiction, as the Green Paper¹¹³ did. Laying down such criteria would have provided legal certainty, transparency and objectivity. Instead of an objective set of criteria, the FD states in Article 11 that Member States have to analyse the facts and merits of the case and all the factors which they consider to be relevant when trying to reach a consensus.¹¹⁴ This is one of the many reasons¹¹⁵ why this FD is a time-consuming, insufficient instrument to prevent conflicts of jurisdiction and provides no real added value.

According to the Green Paper of the European Commission the further step is to create a body on EU level empowered to take a binding decision as to the most appropriate jurisdiction. This would be desirable to solve the current problems of time-consuming transfer procedures and in cases where the suggested dispute settlement between the Member States would fail. Indeed, a new body would have to be set up instead of giving this power to Eurojust, since the roles of a mediator and of an

¹¹² Council of the European Union, Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Republic of Latvia, the Republic of Lithuania, Republic of Hungary, the Kingdom of the Netherlands, Romania, the Republic of Slovenia, the Slovak Republic and the Kingdom of Sweden for a Council Framework Decision on the transfer of proceedings in criminal matters, 12385/09, Brussels, 1 September 2009, <http://db.eurocrim.org/>, accessed 26 February 2014.

¹¹³ Criteria set forward in the Green Paper on Conflicts of Jurisdiction and the Principle of ne bis in idem in Criminal Proceedings: territoriality, criteria related to the suspect or defendant, victims' interests, criteria related to State interests and certain other criteria related to efficiency and rapidity of the proceedings.

¹¹⁴ M. CACHO, M. CARMEN REBOLLEDO and M. TERESA VADELL, "The Themis Project: solving conflicts of jurisdiction in the European Union", Erfurt, May 2012, p. 14-19, <http://www.ejtn.eu/>, accessed 11 April 2014.

¹¹⁵ Other reasons that make the FD insufficient to prevent conflicts of jurisdiction are that there are no necessary deadlines provided and the absence of a binding mechanism.

instance taking binding decisions do not appear compatible and Eurojust has been selected as mediator according to the wording of Article 12 (2) of the FD of 2009.¹¹⁶

2) Deficiencies in international cooperation

Even if there are no conflicts of jurisdiction and only one Member State considers itself competent to prosecute the case, problems with the cross-border dimension will rise. The transnational nature of cross-border cases, the involvement of multiple legal systems and the need to work inter-jurisdictionally are bound to mean quite different issues are faced than in more conventional, national cases. National authorities have to rely for the investigations on international cooperation and on cooperation mechanisms that much too often prove to be deficient. It brings along cumbersome and time consuming legal assistance procedures and language problems. It can easily be concluded that the current system of information exchange and cooperation is not sufficient to tackle cross border cases.¹¹⁷

The Euroneeds study of 2011¹¹⁸ had the aim to evaluate the developing European criminal justice system and to identify practical cooperation problems by interviewing prosecutors, investigators and defence lawyers from 18 Member States¹¹⁹ representative for the legal orders of the EU. Crimes against the financial interests of the EU were included in the research since they were seen as a legitimate European criminal justice interest: *“Because of their scale and nature they should be viewed as of equal concern to any European citizen and taxpayer”*. As matters currently stand, this study certainly appears to deliver a basis upon which to assert that the current criminal justice set up is not in a position to deal with the majority of crimes against the EU’s financial interests. The conclusion of this study was that these crimes are likely to be combated successfully only if a criminal justice perspective beyond the traditional nationally bound is assumed.¹²⁰

¹¹⁶ Commission of the European Communities, Green Paper on Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings, COM (2005) 696 final, Brussels, 23 December 2005, p. 6, <http://eur-lex.europa.eu/>, accessed 26 February 2014.

¹¹⁷ European Commission, Commission Staff Working Document – Executive Summary of the Impact Assessment Accompanying the document Proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office, SWD (2013) 275 final, Brussels, 17 July 2013, p. 2, <http://ec.europa.eu/>, accessed 27 February 2014.

¹¹⁸ M. WADE, “Evaluating the need for and the needs of a European Criminal Justice System”, EuroNEEDS study, Max-Planck-Institut für ausländisches und internationales Strafrecht, Co-funded by the European Commission and OLAF, 2007-13. Hereafter: EuroNEEDS study.

¹¹⁹ Austria, Belgium, Croatia, Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Hungary, Italy, Luxembourg, Netherlands, Poland, Slovak Republic, Spain, Sweden and the United Kingdom.

¹²⁰ EuroNEEDS study, p. 32.

The fundamental deficiencies of this international cooperation can be divided roughly into three categories: problems with evidence (a) which makes prosecutors unable to prosecute cross-border crimes, restrictions to cross-border prosecution (b) which makes prosecutors unwilling to prosecute cross-border crimes, and insufficient powers of EU actors (c). Overall there are of course pragmatic considerations such as the cost and length of these procedures.

a. Evidence

i) Problems with mutual legal assistance and mutual recognition¹²¹

The principles of MLA and MR were proposed as a more horizontal alternative to the vertical model of criminal justice integration suggested by the *Corpus Juris*. They had the objective to ensure the international cooperation between the Member States based on the supposed mutual trust in each other's national systems. The idea was not to reduce the differences between the Member States' systems but to accept these differences because they trust each other sufficiently. Although this system of providing each other with requests and orders sounded good on paper, looking back today on more than a decade of practical experience with MLA and MR makes it clear that these principles did not solve the particular problems in the prosecution of EU fraud. The evaluation in practice shows that there are still several issues with the MLA and MR procedures. First of all, there are still too many refusals of MLA and MR requests. Secondly there are problems with the admissibility of cross-border obtained evidence. And thirdly, the lack of involvement in the cross-border procedure of national prosecutors who are committed to the case leads to malcontent and inconsistencies.

- Refusals -

Refusals of MLA and MR requests are a hampering factor in the cross-border obtaining of evidence. When a request is refused and the investigation measure requested not conducted, there simply is no evidence to be transferred. In accordance to the MLA procedures both active refusals (20 %) and passive refusals (31.43 %)¹²² still occur too often. Because of the complexity the MLA procedure is a very time-consuming one and the large amount of refusals makes it unfulfilling. This makes the national judicial authorities often reluctant to trigger this procedure because of the uncertainty whether the troubles will be worth the results. The MR procedure is supposed to be an improvement to the MLA procedure because the list of refusal grounds is more limited. However, refusals still occur too often to ensure a consistent European approach. The first problem that causes these refusals is that it is rather typical for the MR instruments that they foresee a range of exceptions. The

¹²¹ Hereafter: MLA and MR.

¹²² EuroNEEDS study, p. 29-30.

European Arrest Warrant for example contains a long list of evidence to be excluded because of national reservations, which is actually longer than the list of evidence the warrant can cover. Member States tend to protect their criminal justice systems against foreign decisions through these exceptions. The second main problem is the lack of trust between Member States, which causes friction and tendency to refuse recognition on the basis of minor formalities.

- *Admissibility* -

More important than the refusals because the majority of MLA and MR requests is not refused but granted, is the fact that not all evidence obtained in another Member State is admissible in the requesting Member State. This issue is one of the biggest obstacles to international cooperation. The idea of transmitting orders to other Member States to take certain measures sounds good for the international cooperation but the truth is that this is all a waste of time and resources if the eventual outcome is not considered admissible in the requesting Member State.

The reason for the admissibility problem is that there is an insufficient amount of approximation of procedural rules according to which evidence is collected. The different timeframes and measures to conduct certain actions and conceptual terminological differences prevent evidence from being admissible throughout all the Member States. Instead of approximating the Member States' criminal laws, the EU focuses on the principle of *locus regit actum*¹²³ and since 2000 mostly on the principle of *forum regit actum*^{124, 125}. One might wonder why there are admissibility problems when it is the law of the forum country that governs the formalities of the procedure. First of all, the rule of FRA is often abated in practice as the MLA Convention of 2000¹²⁶ provides in Article 4 the possibility for the locus country to deviate from the formalities provided by the forum country if "*such formalities and procedures are contrary to the fundamental principles of law in the requested Member State*". Secondly, the FRA rule entails no admissibility commitment so that even if the evidence is gathered

¹²³ The locus country, the country where the investigation takes place, decides on the procedures and formalities of the evidence gathering. Hereafter: LRA.

¹²⁴ The forum country, the country where the court is seated, sends a request with procedures and formalities on the evidence gathering to the locus country. Hereafter: FRA.

¹²⁵ Since the EU Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000, the principle of *forum regit actum* is the official rule, except in three situations where the principle of *locus regit actum* is still applicable: controlled delivery, infiltration and joint investigation teams.

¹²⁶ Council of the European Union, Act establishing in accordance with Article 34 of the Treaty on the European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, 29 May 2000, *Official Journal of the European Communities*, C 197, 12 July 2000. Hereafter: MLA Convention.

exactly like the judge requested it, he/she is not obliged to accept this evidence. Thirdly, this rule creates a one-on-one and case-by-case approach so that if the case gets transferred, the third Member State is not obliged to accept the mode of evidence gathering used by the previous Member States.

The lack of approximated evidence gathering rules not only leads to admissibility problems between the Member States but also with regard to evidence gathered by EU bodies. There are no general provisions concerning the use and recognition of evidence gathered in multidisciplinary investigations by administrative EU bodies¹²⁷ in national judicial proceedings. Evidence gathered by these bodies often remains unused and therefore it often happens that investigative acts are duplicated because evidence is collected twice. This can hardly be considered as efficient.¹²⁸

- *Lack of involvement* -

National prosecutors who handle the case are not involved in the cross-border investigations in other Member States where they make a request. Table 4 below shows that a majority of 80% of the national prosecutors would like to be more involved in this cross-border evidence gaining. This demonstrates the discontent with the fact that colleague prosecutors who are dealing with the MLA or MR requests are positioned as relatively distanced service-providers.

Table 4: Opinions of national prosecutors of financial crimes on involvement in cross-border evidence collecting¹²⁹

Would interviewee prefer to become directly involved in collecting evidence in another member state where interviewee makes a request?		
Answer	Count	Percentage
No (1)	2	5.71%
Yes (2)	28	80.00%
No answer	5	14.29%

Table 4 indicates that national prosecutors are not satisfied with how the evidence gathering is handled in other Member States. The lack of priority or urgency assigned to their requests is one

¹²⁷ Like Eurojust, Europol and OLAF.

¹²⁸ European Commission, 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, Brussels, 17 July 2013, p. 21, <http://ec.europa.eu/>, accessed 20 February 2014.

¹²⁹ EuroNEEDS study, p. 36.

reason why prosecutors prefer to be involved more directly in gathering evidence abroad. Also a reason is that more direct involvement would provide the ability to make quick reactive decisions as they would accompany the essential stages of the investigations themselves. The fact that the investigations would partly be run by the person who identifies with the case as a whole would only benefit the consistency of the case.

A solution thinkable in this context is the setting up of a joint investigation team, hereafter 'JIT', which would obviously increase the involvement of national prosecutors in cross-border investigations. These JIT's are envisaged in Article 13 of the MLA Convention but in view of the slow progress towards its ratification, the Council of the European Union adopted on 13 June 2002 a Framework Decision on Joint Investigation Teams.¹³⁰ JIT's are set up by mutual agreement for a specific purpose and a limited period to carry out investigations in one or more parties setting up the team. The teams can be used with regard to "difficult and demanding investigations having links with other Member States" or cases in which the "circumstances of the case necessitate coordinated, concerted action in the Member States involved".¹³¹ Picture 1 shows the different advantages of setting up a JIT.

Picture 1: Advantages of JIT's¹³²



Picture 1 highlights the main advantages of a JIT. It is evident that a JIT will save time and will provide swift and efficient investigations because it helps to avoid double acts of investigation and shortens time of waiting for a request of international assistance to be realised. The main advantage of JIT's is

¹³⁰ Council of the European Union, Framework Decision on joint investigation teams, 2002/465/JHA, 13 June 2002, *Official Journal of the European Communities*, L 162, 20 June 2002. Hereafter: FD JIT's.

¹³¹ Art. 1 (1) FD JIT's.

¹³² M. LILOVA, "Joint Investigation Teams – way of functioning + case studies", Bulgaria, 10 June 2011, <http://ebookbrowse.net/joint-investigation-teams%E2%80%93way-of-functioning-and-case-studies-mariana-lilova-eurojust-pdf-d470200992>, accessed 2 April 2014.

that the sharing of information or the requesting of investigative measures can happen directly between the JIT members without the need for formal requests.¹³³ Another major advantage is that the investigation is not jeopardized because the seconded members¹³⁴ of the JIT are allowed to operate in the team across their national borders, but at the same time are entitled to their full national competences. This direct sharing of information and granting members of the JIT the possibility to operate in other Member States while keeping all of their national competences, reduces the need for MLA/MR requests.¹³⁵ The initial request for setting up a JIT might be considered as a request for mutual assistance but the further requests are informally issued and thus not under the traditional MLA regime.¹³⁶

Although the JIT's seem an ideal solution for the desired increase of involvement of national prosecutors in cross-border investigations, there are some practical issues to it. Firstly, it must be said that the wording in Article 1 (10) of the FD JIT's "*information lawfully obtained by a member or seconded member while part of a joint investigation team... may be used*" means that the evidence gathered might still not be admissible in the Member State where the court is located, as there is still no admissibility commitment. The second issue is that setting up a JIT entails high expenditures for mostly travel and accommodation costs.¹³⁷

ii) Practical difficulties

The cross-border obtaining of evidence also entails certain practical difficulties. Evidence collected outside of the national territory can be hampered by language barriers, which bears a considerable risk of delay in the investigation and less efficient prosecution. Above there is elaborated on the possibility of setting up JIT's. These special teams would be a solution for the practical language barriers as the ability for members of the JIT to be present at interviews, house searches, seizures

¹³³ Art. 1 (7) FD JIT's: "*Where the JIT needs investigative measures to be taken in one of the Member States setting up the team, members seconded to the team by that Member State may request their own competent authorities to take those measures in accordance with the conditions that would apply if they had been sought in a national investigation*".

¹³⁴ Members of the JIT from Member States other than the Member State in which the JIT operates (Art. 1 (4) FD JIT's).

¹³⁵ G. VERMEULEN, Course International Criminal Law at Ghent University, 2013-2014.

¹³⁶ C. RIJKEN and G. VERMEULEN, "The legal and practical implementation of JITs: The bumpy road from EU to Member State level", in C. RIJKEN and G. VERMEULEN (eds.), *Joint Investigation Teams in the European Union: From Theory to Practice*, The Hague, TMC Asser Press, 2006, p. 15.

¹³⁷ J. NAGY, "About joint investigation teams in a nutshell", *Current Issues of Business and Law*, 2009, vol. 4, p. 155-156.

and other investigative measures in all jurisdictions covered obviously helps to overcome these language barriers.¹³⁸

b. Restrictions and negative attitude to cross-border prosecution

The success of MLA and MR procedures depends primarily on the individual effort of the investigator or prosecutor involved. It is thus important that the national prosecutors are stimulated by their national systems to handle these requests adequately. However, the numbers on national restrictions and negative attitude to cross-border cases are striking. There is not only a serious lack of authority granted by national laws but also a trend amongst prosecutors to deliberately limit their efforts to the national elements.

National prosecutors often claim that they do not have the authority to investigate certain cross-border cases of fraud. Of the interviewed prosecutors of financial crimes 40% found disincentives within their national systems for bringing such cases and 57% considers that European cases are not fully recognised by the national authorities. Indeed, there is an obvious tendency in Member States to put complex European fraud cases at the bottom of the pile. An important reason for this phenomenon is the lack of sense of responsibility for such cases, as national authorities may wrongly count on other Member States to deal with the case.¹³⁹

Furthermore, even if national prosecutors would have the authority to handle cross-border cases, some confirm that they only prosecute cases when the relevant EU interests are compromised exclusively on their territory.¹⁴⁰ Also, 54% of the prosecutors admits to sometimes limiting their investigation to the national aspects of a case even though they recognise its European dimension. They disregard the potentially much wider implications of an international fraud scheme just to facilitate the investigation. And even if the national prosecutors deal with cases with a European

¹³⁸ *Ibid*, p. 149.

¹³⁹ European Commission, 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, Brussels, 17 July 2013, p. 19, <http://ec.europa.eu/>, accessed 20 February 2014.

¹⁴⁰ European Commission, Communication from the European Commission to the European Parliament, the Council, the European economic and social committee and the committee of the regions on the protection of the financial interests of the European Union by criminal law and by administrative investigations – An integrated policy to safeguard taxpayers' money, COM (2011) 293 final, Brussels, 26 May 2011, p. 8, <http://ec.europa.eu/>, accessed 27 November 2013.

dimension, internal performance indicators show that they treat work on European cases not identically to national cases for 34% of the cases.¹⁴¹

These disincentives and negative attitudes are a deficiency in the international cooperation but are also a consequence of the deficient international cooperation. After all, it is only logic that Member States will not prioritise complex cross-border cases which demand of them a high cost and provide only a low return.

c. Limited powers of existing EU actors

The powers of the existing EU bodies prove to be insufficient to ensure effective prosecution of crimes against the EU's financial interests. Eurojust, Europol and OLAF are organisations that have competence in *inter alia* crimes against the EU budget but the legal basis for real conducting capacity is lacking. Ensuring follow-up of their analysis is something they just cannot do. The EPPO is intended to fill this institutional gap.

Eurojust's powers are soft powers, meaning that they can advise and encourage Member States in accordance to investigations but they are not able to conduct or direct investigations through binding decisions. The authority of Europol is also strictly non-binding as Europol only provides intelligence, information and assistance to Member States without being able to ensure follow-up of its analyses or direct investigations. OLAF, as a specialised anti-fraud office, is limited to carry out administrative investigations and making recommendations to Member States without having enforceable competences.¹⁴² Because of certain data protection rules, the information exchange between OLAF and the Member States does not always happen very fluently. Also, there are some Member States which restrict the cooperation with non-judicial bodies like OLAF because of national rules on judicial secrecy.¹⁴³

¹⁴¹ European Commission, Commission Staff Working Paper to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Accompanying the document Communication from the Commission on the protection of the financial interests of the European Union by criminal law and by administrative investigations: An integrated policy to safeguard taxpayers' money, SEC (2011) 621 final, Brussels, 26 May 2011, p. 22, <http://eur-lex.europa.eu/>, accessed 28 November 2013.

¹⁴² European Commission, 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, Brussels, 17 July 2013, p. 15, <http://ec.europa.eu/>, accessed 25 November 2013.

¹⁴³ European Commission, Proposal for a Council Regulation on the establishment of a European Public Prosecutor, COM (2013) 534 final, Brussels, 17 July 2013, p. 52, <http://eur-lex.europa.eu/>, accessed 26 November 2013.

According to findings of the UK Parliament there are several limitations on the effectiveness of these bodies, such as budgetary restrictions which force OLAF to be selective about the cases of EU fraud that it pursues, or the tangled web between Eurojust, Europol and OLAF which contributes to the lack of a coordinated response to fraud on the EU's budget.¹⁴⁴

And even if these bodies would actually have the powers and the budget to ensure effective prosecution, the question still remains whether they would prioritise the prosecution of crimes against the financial interests of the EU. It is a fact that Eurojust and Europol have wider remits than the protection of the financial interests of the EU so EU fraud is only a small aspect of their diverse workload. The prosecution of EU fraud is important but not predominant in their work, so the protection of the financial interests of the EU might never be a priority for these bodies.¹⁴⁵

2.1.3. Partial solution: stepping-up approximation

To achieve the area of freedom, justice and security it envisaged, the Treaty of Amsterdam of 1997 put forward two key methods: closer cooperation between domestic authorities and approximation. Although the Treaty provided strong instruments to achieve approximation, most post-Amsterdam initiatives represent the interest of enhancing mutual recognition of Member State decisions.¹⁴⁶

At the European Council in Tampere in 1999 the common rationale remained one of enhancing cooperation rather than creating an integrated single criminal justice system through approximation. With the focus on cooperation and mutual recognition, Member States want to avoid the controversies and costs that an intensive approximation entails. Ambitious projects such as the *Corpus Juris* in the 1990's had led Member States to fear the establishment of supranational criminal law and enforcement. Therefore, approximation has been kept to the absolute minimum and instead the EU adopted a whole range of measures to facilitate cooperation without putting the national authorities under any central control or forcing them to change anything about their systems. This process has brought some progress but also came with a price: the minimalistic approach to

¹⁴⁴ UK House of Lords – European Union Committee, “The fight against fraud on the EU finances”, twelfth report of session 2012-13, published 17 April 2013, p. 6, <http://www.publications.EuropeanParliament.uk>, accessed on 25 February 2014.

¹⁴⁵ A. WILLIAMS, “Fighting fraud in the EU: a note on icebergs and evidence”, *ERA Forum*, 2013, p. 228.

¹⁴⁶ S. MIETTINEN, *Criminal law and policy in the European Union*, New York, Routledge, 2013, p. 30-31.

approximation has left national systems with large margins of discretion as regards e.g. the definition of criminal acts, penalty levels and evidence standards.¹⁴⁷

So Member States chose to work with cooperation measures instead of gradually approximating their criminal systems. But as one can learn from the analysis of the problems these cooperation techniques entail, this situation tends to perpetuate the differences between the national criminal justice systems rather than to reduce them. This because of the fact that the MLA and MR principles entail that Member States trust each other enough to accept the differences in the national systems. However, this supposed trust was lacking in practice. It creates a vicious circle: in a system focussed on cooperation with very limited approximation, the differences between the national systems remain. But on the other hand, the Member States naturally tend to protect their national criminal justice systems against the reach of foreign decisions through various exceptions and conditions. The trust between them is lacking because their criminal justice systems are too different. The MR principle can only work in practice when there is sufficient trust between the Member States so it goes hand in hand with approximation of the national laws, which would stimulate a greater legal familiarity with each other's national systems. So it is clear now that the international cooperation instruments evolved without sufficient approximation. However, these cooperation instruments alone are not sufficient and must be accompanied by approximation.¹⁴⁸

Approximation can be established through minimum rules. Therefore, the Lisbon Treaty inserted Article 83 in the TFEU, providing a legal basis for approximation. The rule in Article 83 TFEU is that minimum rules may be established but only when it is "*necessary to facilitate mutual recognition and police and judicial cooperation in criminal matters having a cross-border dimension*" and they shall concern "*mutual admissibility of evidence between Member States (a), the rights of individuals in criminal procedure (b), the rights of victims of crime (c) and any other specific aspects of criminal procedure (d)*". For example, when analysing the evidence gathering rules it appears that the current rules of LRA and FRA have two deficiencies. They entail no admissibility commitment and create a one-on-one and case-by-case approach. This makes minimum rules in evidence gathering desirable to ensure a more consistent approach throughout all the Member States and in all of the cases.¹⁴⁹

¹⁴⁷ J. MONAR, "Eurojust's present and future role at the frontline of European Union criminal justice cooperation", *ERA Forum*, 2013, p. 188-190.

¹⁴⁸ K. LIGETI, "The European Public Prosecutor's Office: How Should the Rules Applicable to its Procedure be Determined?", *European Criminal Law Review*, vol. 1, no. 2, 2011, p. 144.

¹⁴⁹ W. DE BONDT, *Course European Criminal Policy at Ghent University*, 2013-2014.

Approximation is stimulated by certain measures. Above there has been elaborated on the concept of the JIT's. One can imagine that when Member States join together in an investigation team, the mutual trust between them and the familiarity with each other's criminal justice systems increase. This trust and familiarity feed the willingness of Member States to achieve closer cooperation and approximation of their laws. Indeed, the majority of participants of closed JIT's consider JIT's to be beneficial and agree that this measure contributes to a European criminal justice area.¹⁵⁰

Not only the setting up of JIT's but also the EPPO is an incentive for approximation. Because from the viewpoint of the functioning of the EPPO, it is important to find the right balance between approximated procedural rules and rules left to the domestic law of the Member States subject to MR.¹⁵¹ So for the EPPO to function properly, a certain level of approximation is indispensable. Currently there are several technical problems¹⁵² with the EPPO proposal, which underline the need for approximated European rules.¹⁵³ Approximation and the enforcement of those approximated rules through EU bodies should thus be established to enhance international cooperation because it has been made clear in this chapter that the mere use of cooperation instruments is not sufficient.

2.2. National cases of EU fraud

Where the crimes against the financial interests of the EU can be located in one Member State, there are two national practices that explain why the level of prosecution of these offences appears to be so low. There are several procedural impediments to the prosecution: firstly, the fact that not all cases of EU fraud are reported to the national prosecution services, and secondly it is often the case in Member States that for certain types of EU fraud it is not the national prosecution services that decide on the prosecution but *de facto* administrative services that handle these fraud cases with settlements.

¹⁵⁰ J. NAGY, "About joint investigation teams in a nutshell", *Current Issues of Business and Law*, 2009, vol. 4, p. 158.

¹⁵¹ K. LIGETI, "The European Public Prosecutor's Office: How Should the Rules Applicable to its Procedure be Determined?", *European Criminal Law Review*, vol. 1, no. 2, 2011, p. 144.

¹⁵² For more information on this, see *infra*, Chapter four: The feasibility of the EPPO, part II: How the EPPO would function in practice, 3. Procedural aspect.

¹⁵³ V. FRANSSSEN, "Europees openbaar ministerie: kaskraker of hoofdbreker?", *De Juristenkrant*, 23 October 2013, p. 12.

2.2.1. Unreported fraud

When a case of EU fraud is located entirely in one Member State, the Member State concerned will consider this to be a purely national case and apply its own practices. It is often the case in Member States' practices that very few cases of fraud are reported to the national prosecution services and are the responsibility of administrations. This can be demonstrated by explaining the practices of handling fraud cases in three representing Member States: Belgium, Germany and the United Kingdom. For example, in Belgium there is a limitation of information supply to the prosecution services in three different types of fraud. For customs fraud the prosecution decision is not in the hands of the prosecution services but in those of the customs administration services, so that these types of offences are not systematically communicated to the public prosecutor. For agricultural fraud the competent Belgian officials will only report a case to the prosecution services when the situation is not regularized post-factum. Lastly, for VAT¹⁵⁴ fraud there is deliberately introduced a provision that limits the information supply to the national prosecution services.¹⁵⁵

In Germany the handling of VAT fraud depends on whether the failure to file taxes is the result of negligence or whether the act was intentional. The cases of negligence will be handled by the department for fines and criminal proceedings which handles cases administratively through settlements. Intentional cases are the responsibility of the department of public prosecution which processes cases that will pass through the criminal justice system.¹⁵⁶ Only very serious cases will pass through court and most cases will be handled through settlements because the burden of proof is much heavier when having to prove intent than when having to prove mere carelessness. The majority of the cases are thus not reported to the public prosecutor.

The situation is different in the UK but leads again to unreported fraud cases. The handling of a case of VAT fraud is subject to a decision by a tripartite body: representatives from the investigative branch, the solicitor's office and the administrative branch, who decide to prosecute a case civilly,

¹⁵⁴ The EU's VAT is a value added tax which is compulsory for the Member States. As a consumption tax, the EU VAT taxes the consumption of goods and services in the EU.

¹⁵⁵ C. FIJNAUT, L. HUYBRECHTS and C. VAN DEN WYNGAERT, *EG-fraudebestrijding in de praktijk*, Antwerpen, Maklu, 1994, p. 41-44.

¹⁵⁶ A. ARONOWITZ, D. LAAGLAND and G. PAULIDES, "The detection and settlement of VAT fraud in four countries", in *Value-added tax fraud in the European Union*, Amsterdam, Kugler Publications, 1996, p. 34-36.

criminally, to compound¹⁵⁷ a case or to seek no further action. Most cases of fraud are handled civilly and only serious cases go to court or are compounded.¹⁵⁸

2.2.2. Administrative settlements

At Member State level a lot of fraud cases are handled with settlements. As mentioned above, the cases of negligence in Germany and the compounded cases in the UK are the subject of settlements. In Belgium, the customs administration service handles cases of customs fraud with a settlement in 95% of all violations.¹⁵⁹

Although many support these settlements because they seem to be efficient, the question arises whether these settlements suffice to meet with the Member States' obligation in Article 325 TFEU to foresee "*effective, proportionate and dissuasive*" sanctions to tackle EU fraud. As ruled in the Greek Maize case¹⁶⁰, this article does not only entail the obligation to establish rules that provide these sanctions but these sanctions also have to be instrumental, which means that the sanctions need to provide a sufficient deterrent effect. There are voices proclaiming that these administrative settlements and the lack of criminal law enforcement do not meet the requirement of having sufficient deterrent effect. A supranational prosecution body at EU level like the EPPO would be able to prosecute these cases itself and give binding orders to the national prosecution services. This would lead to more criminal prosecution of EU fraud and fewer settlements. However, proposing an EPPO as the ultimate solution to these problems must first sustain the essential subsidiarity test.

¹⁵⁷ To compound a case means to settle a debt or other matter in exchange for money or other consideration to avoid a criminal prosecution by the prosecution services.

¹⁵⁸ A. ARONOWITZ, D. LAAGLAND and G. PAULIDES, "The detection and settlement of VAT fraud in four countries", in *Value-added tax fraud in the European Union*, Amsterdam, Kugler Publications, 1996, p. 26.

¹⁵⁹ C. FIJNAUT, L. HUYBRECHTS and C. VAN DEN WYNGAERT, *EG-fraudebestrijding in de praktijk*, Antwerpen, Maklu, 1994, p. 44.

¹⁶⁰ Commission of the European Communities v. Hellenic Republic, 21 September 1989, C-68/88, ECR 2965, <http://eur-lex.europa.eu/>, accessed on 14 March 2014.

III. Core of the subsidiarity test

The current prosecuting practice in the EU is in desperate need for an intervention. In view of the fact that the Union budget is currently administered at national level and results in the area of criminal prosecution remain disappointing, common European solutions are necessary to make the fight against fraud more effective across the Union. The setting up of an EPPO is one of those European solutions. The EPPO will strengthen the protection of the Union's financial interests by ensuring a more coherent and efficient European system for investigation and prosecution. The number of prosecutions will increase, leading to more convictions and recovery of fraudulently obtained Union money and higher deterrence.¹⁶¹

But the EPPO proposal can only be negotiable if it stands the subsidiarity test. The subsidiarity control mechanism is envisaged in Article 6 of the Protocol No. 2 to the Treaties on the application of the principles of subsidiarity and proportionality¹⁶²: “Any national Parliament or any chamber of a national Parliament may, within eight weeks from the date of transmission of a draft legislative act, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity”. If the threshold provided for in Article 7 (2) of one quarter of the votes¹⁶³ is reached, the proposal has to be reviewed by the European Commission. On the basis of that review the European Commission decides whether to maintain, amend or withdraw the proposal and it must give reasons for its decision. Fourteen national parliaments¹⁶⁴ sent reasoned opinions of non-compliance of the EPPO proposal to the European Commission within the deadline of 28 October 2013, issuing a so called ‘yellow card’ against the EPPO proposal. In practice this yellow card means either that the EPPO proposal is dead or that it will have to be revised significantly in order to meet legitimate national concerns. From a legal point of view a third option is still possible, namely that of enhanced cooperation.¹⁶⁵ However, it is argued that the idea of enhanced cooperation is completely

¹⁶¹ European Commission, Commission Staff Working Document – Executive Summary of the Impact Assessment Accompanying the document Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, SWD (2013) 275 final, Brussels, 17 July 2013, p. 3, <http://ec.europa.eu/>, accessed 15 March 2014.

¹⁶² Protocol (No 2) on the application of the principles of subsidiarity and proportionality, *Official Journal of the European Union*, C 115/206, 9 May 2008.

¹⁶³ As opposed to the normal threshold of one third of the votes.

¹⁶⁴ These votes came from 11 Member States: Czech Republic, Cyprus, Netherlands, France, Hungary, Malta, Romania, Slovenia, Sweden, and also Ireland and the UK.

¹⁶⁵ Article 86 (1) para. 3 TFEU.

at odds with the European Commission's core argument that "*EU fraud needs to be combated in a more uniform way throughout the whole Union*".¹⁶⁶

The European Commission confirmed the triggering of the subsidiarity control mechanism on 6 November 2013. In its Communication of 27 November 2013¹⁶⁷ the European Commission performed the double subsidiarity test on the EPPO. First is tested whether Member States are capable to solve the current inadequate prosecuting situation themselves and secondly, the added value of an action at EU level is analysed. After performing these two tests the European Commission decided to maintain the proposal.

1. Member States will/cannot solve it themselves

The first part of the subsidiarity test is based on the idea that a supranational approach to the protection of the financial interests of the Union can only be justified in a complementary way: it should be confined to only those crimes which the Member States cannot/do not want to prosecute. That Member States are often not willing to prosecute is not always caused by the lack of sufficient means to fight cross-border crimes, but by the lack of motivation to protect EU funds adequately. Member States tend to reason that the EU budget is different from the national budget: "*It is not our money, so why would we struggle to protect it?*". This way of thinking made WILLIAMS justly remark that without a body specifically tasked with the protection of the financial interests of the EU there will never be an effective fight against EU fraud.¹⁶⁸

According to the European Commission, the Member States also cannot solve the current problems in the prosecution of crimes against the financial interests of the EU. The European Commission has carefully analysed the reasoned opinions submitted by national Parliaments and has refuted all their arguments, demonstrating that criminal prosecutions conducted by national authorities do not and cannot achieve the results expected from a Union-level enforcement regime. The fundamental reasons brought forward by the European Commission can be divided into three main groups:

¹⁶⁶ V. FRANSSSEN, "National European Parliaments issue yellow card against the European Public Prosecutor's Office", 4 November 2013, <http://europeanlawblog.eu/>, accessed 9 March 2014.

¹⁶⁷ European Commission, Communication from the European Commission to the European Parliament, the Council and the National European 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, Brussels, 27 November 2013, <http://ec.europa.eu/>, accessed 13 March 2014.

¹⁶⁸ A. WILLIAMS, "Fighting fraud in the EU: a note on icebergs and evidence", *ERA Forum*, 2013, p. 228.

approximation instruments are not sufficient (1.1), insufficient overall Member State action (1.2), and limited powers of existing EU bodies (1.3).

1.1. Approximation instruments are not sufficient

Approximation of substantive criminal law through the establishment of minimum rules is an important element of the overall protection of the Union's financial interests. But approximation cannot be established effectively by the Member States alone because the substantive criminal law in the EU still suffers from a series of shortcomings: there are not enough approximation instruments and there are deficiencies in the implementation of the existing instruments by Member States. The main substantive criminal law instrument at EU level for the protection of EU financial interests is the PIF Convention. This convention however has a lot of defects: it is not fully ratified by all the Member States, it does not apply to the entire field of criminal activity relevant for the protection of EU financial interests and it provides no obligation for Member States to establish competence for prosecution, criminal sanctions for legal persons and certain minimum standards. Because the most important criminal law instrument is hampered by these deficiencies, the EU rules have had little impact. Consequently, Member States' judicial authorities use their traditional national criminal law tools to fight crime against the financial interests of the EU so discrepancies in the implementation of the basic criminal law concepts persist.¹⁶⁹

There is thus a need for more efficient instruments for the approximation of EU criminal law. The European Commission has reacted on this and put forward a proposal for a new Directive on the fight against fraud to the Union's financial interests in 2012¹⁷⁰, which introduces common definitions for offences, a duty for Member States to criminalise certain behaviour and rules on penalties. Some national Parliaments state that the European Commission should have waited for the adoption of this proposed directive before envisaging new legislation in this field with the proposal for an EPPO. Those Member States are of the opinion that the amount of approximation instruments first needs to be broadened in order to provide Member States with efficient tools for prosecution and cooperation instead of jumping to action at the EU level. But this touches upon the second problem: even with better instruments for approximation the problems would still not be solved. This is

¹⁶⁹ European Commission, Commission Staff Working Paper to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Accompanying the document Communication from the Commission on the protection of the financial interests of the European Union by criminal law and by administrative investigations: An integrated policy to safeguard taxpayers' money, SEC (2011) 621 final, Brussels, 26 May 2011, p. 11, <http://eur-lex.europa.eu/>, accessed on 16 February 2014.

¹⁷⁰ European Commission, Proposal for a Directive of the European Parliament and of the Council on the fight against fraud on the Union's financial interests by means of criminal law, COM (2012) 363 final, Brussels, 11 July 2012, <http://eur-lex.europa.eu/>, accessed 13 February 2014.

because approximation alone is not enough and needs to be complemented with other measures to enforce approximation. LÓPEZ AGUILAR¹⁷¹ confirms this with its statement that *“the protection of the financial interests of the EU cannot solely be dealt with through a common definition of criminal offences and common establishment of criminal sanctions. It is a great step but simply not enough. There is a need for an institution that enforces criminal law-making: the EPPO”*.¹⁷²

That is why the European Commission is not obligated to first await the adoption of instruments for approximation before it proposes other measures, like the EPPO and the strengthening of Eurojust. The European Commission sets out two arguments that support this view: first of all, harmonised definitions of offences and sanctions and minimum standards will not as such provide satisfactory results without being accompanied by effective vertical investigation and prosecution measures. These harmonised offences and sanctions even provide the substantive basis for the offences within the EPPO’s competence.¹⁷³ Secondly, the proposal for that directive and the proposal to establish an EPPO have different, although complementary, objectives so that the European Commission considers that it does not need to await the results of the proposed directive before proposing the EPPO. The results of the proposed directive do not have any direct bearing on the subsidiarity test regarding the current proposal.

So it is now established that the current legal framework in the EU, with the PIF Convention as the fundamental instrument, is not sufficient to protect the financial interests of the EU. The European Commission estimates that even with an efficient new directive not all fraud can be prevented. Efforts in creating new instruments will not suffice and need to be complemented by an effective and deterrent enforcement mechanism, as norms work better when strong non-compliance rules exist. Approximation must be complemented with vertical enforcement measures through the EPPO.

1.2. Insufficient Member State action overall

As reply on the European Commission’s statement that Member States’ prosecution action does not suffice to protect the financial interests of the EU, certain national Parliaments argued that the variations between different Member States and within Member States need to be taken into account. These arguments were not convincing to the European Commission and rebutted.

¹⁷¹ Juan Fernando López Aguilar is a member of the European Parliament and Chair of the LIBE Committee.

¹⁷² Eurojust News, issue 8, May 2013, p. 10, <http://eurojust.europa.eu/>, accessed 17 April 2014.

¹⁷³ S. WHITE, “A Decentralized European Public Prosecutor’s Office. Contradiction in Terms or Highly Workable Solution?”, *eucri*, 2012/2, p. 73.

Some Member States are perfectly capable of conducting efficient prosecutions of crimes against the financial interests of the EU. These countries opine that the Union's action should be limited and focussed on those Member States where there might be weaknesses, so that the competent Member States can stay in charge of their own cases. The European Commission points out that the subsidiarity principle requires a comparison between the efficiency of action at the Union level and action at the Member State level in general: *"The situation in particular Member States is not decisive in itself, as long as it can be shown that action at the level of the Member States is generally insufficient, and that Union action would generally better achieve the policy objective"*.¹⁷⁴

Also an argument of some Member States, primarily the UK, as to why their action is sufficient, is the fact that the European Commission has not considered the efficiency of action at regional or local level, which is particularly important where devolved administrations may have discrete criminal justice systems. The European Commission does not find this argument convincing: *"The division of powers between a Member State, its regions and its municipalities is a purely internal matter. When the Commission refers to the insufficiency of Member State action, that statement necessarily encompasses all the possible levels of Member States"*.¹⁷⁵

1.3. Limited powers of EU bodies

Previous parts of this thesis proved the need for a central placed prosecuting body. The existing EU bodies currently have limited powers but some argue that the proposed reforms of Eurojust, Europol and OLAF will give them more powers to establish efficient prosecution, abrogating the need for a new supranational body. However, the European Commission remains convinced that none of them could address the current shortcomings because the proposed reforms would at best have marginal effects because of the inherent limitations in the TFEU.¹⁷⁶ Even the most far reaching reforms could not remedy the present shortcomings in the prosecution of Union fraud because of the very nature of those structures. Under the TFEU, such far-reaching powers can only be given to an EPPO.

¹⁷⁴ European Commission, Communication from the European Commission to the European Parliament, the Council and the National European 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, Brussels, 27 November 2013, p. 6-7, <http://ec.europa.eu/>, accessed 4 March 2014.

¹⁷⁵ *Ibid*, p. 7.

¹⁷⁶ *Ibid*, p. 7-8.

1.4. Conclusion

The European Commission concludes that, in accordance with Article 5 (3) TEU, the objectives of the EPPO proposal cannot be sufficiently achieved by the Member States, by existing mechanisms and EU bodies, or by proposed legislation. It maintains the opinion that a genuine improvement of the protection of the Union's financial interests will only come through the establishment of the EPPO.¹⁷⁷

2. EU added value

To prove the genuine added value the EPPO would provide, it must be demonstrated that it will provide a solution for the problems in the current prosecution of crimes against the financial interests of the EU. As stated above, there are currently two main problems: the fact that the level of prosecution is varying and low. In this part the EPPO as a solution for both these problems will be set forward.

2.1. The EPPO as a solution to the varying prosecution level

2.1.1. Common EU policy -> stronger deterrence and prevention

The EPPO would set a common policy for investigating and prosecuting crimes against the financial interests of the EU throughout all the Member States, as it will initiate an investigation as soon as the offence falls within its competence.¹⁷⁸ This will put an end to the divergent investigation and prosecution choices in the different legal systems and will prevent criminals from being able to forum shop. The deterrence will grow because criminals would be aware of the detection risk the EPPO will impose.¹⁷⁹ Besides, according to Article 27 (4) of the proposed EPPO regulation, the EPPO will choose the Member State in which the prosecution and trial will take place. This power of the EPPO will also solve the jurisdiction conflicts.

So not only the decision to initiate an investigation will be transferred to the EPPO but also the decision in which Member State the prosecution will take place. This will naturally solve the varying

¹⁷⁷ *Ibid*, p. 8-9.

¹⁷⁸ Article 16 (1) proposed EPPO regulation.

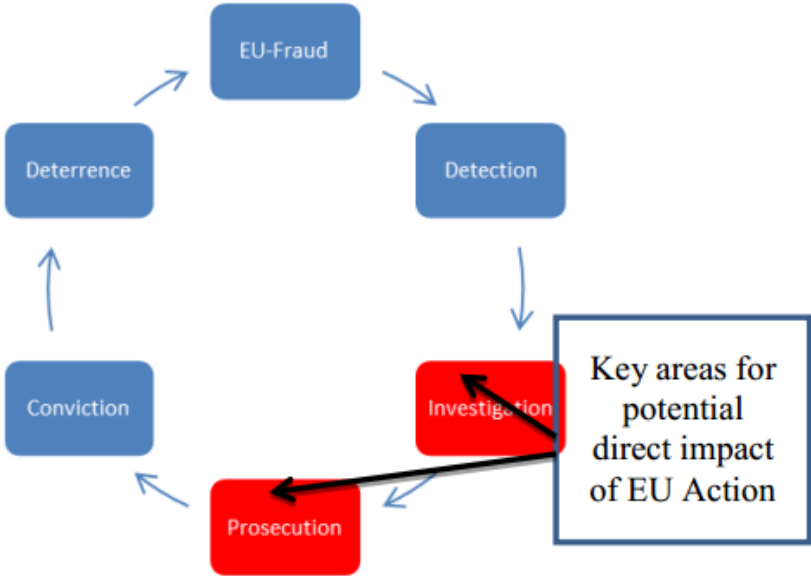
¹⁷⁹ European Commission, Communication from the European Commission to the European Parliament, the Council and the National European Parliaments on the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office with regard to the principle of subsidiarity in accordance with Protocol No 2, COM (2013) 851 final, Brussels, 27 November 2013, p. 9, <http://ec.europa.eu/>, accessed 5 March 2014.

prosecution levels of EU fraud in the Member States. In turn the legitimacy of EU expenditure will be ensured and the public trust in the Union heightened.¹⁸⁰

2.2. The EPPO as a solution to the low prosecution level

It has been established that Member States tend not to prioritise the investigation and prosecution of crimes against the financial interests of the EU. The enforcement cycle shows that when the investigation efforts are low, this influences other facets of enforcement, leading to the low prosecution and conviction rates and recovery of costs. This is set out in picture 2 below. The European Commission is and has always been of the opinion that a supranational EU body like the EPPO would have significant added value in the current inefficient investigating and prosecuting situation and would increase the number of effective prosecutions. This would in its turn increase the level of conviction and deterrence of EU fraud, as picture 2 demonstrates.

Picture 2: Key areas in the enforcement cycle for potential direct impact of the EPPO¹⁸¹



This picture clarifies how the different stages in the fight against EU fraud reinforce each other, leading to a vicious circle. The number of crimes against the financial interests of the EU has been increasing but the level of detection of these crimes has not. A low detection level leads to an even

¹⁸⁰ European Commission, Proposal for a Council Regulation on the establishment of a European Public Prosecutor, COM (2013) 534 final, Brussels, 17 July 2013, p. 51-52, <http://eur-lex.europa.eu/>, accessed 15 April 2014.

¹⁸¹ European Commission, 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, Brussels, 17 July 2013, p. 12, <http://ec.europa.eu/>, accessed 15 March 2014.

lower investigation level, as not all detected crimes are investigated. This low investigation rate leads to low prosecution rates, which leads to low conviction rates and low deterrence, leading eventually to even more EU fraud. So in order to break this vicious circle and decrease the number of cases of EU fraud, the conviction rate must go up by increasing the investigation and prosecution rates. Although not all of these aspects can be achieved through EU action because the detections and convictions will remain in the hands of the national law enforcement and judicial authorities, the investigations and prosecutions would improve if led by a body like the EPPO.

The European Commission is convinced that the low levels of investigation and prosecution of EU fraud will be raised by an EPPO. The main elements that substantiate this view are that the EPPO will ensure the investigation and prosecution of every case of EU fraud, will have the ability to discover cross-border links, will have enforceable powers, will ensure efficient investigations and prosecutions, and that the EPPO will provide a solution to the crucial problem of the evidence admissibility.

2.2.1. Every case of EU fraud will be followed up

The EPPO will initiate an investigation for every offence that falls within its competence. This emerges from Article 16 (1) of the proposed EPPO regulation: *“The EPPO shall initiate an investigation by written decision where there are reasonable grounds to believe that an offence within its competence is being or has been committed”*. The EPPO will thus make sure that every case involving suspected fraud against the EU budget is followed up and completed. This thorough approach will provide a strong deterrent effect because criminals will be well aware that they will be prosecuted and brought to justice in every case.¹⁸²

2.2.2. Discover cross-border links

The EPPO will be exclusively competent to investigate and prosecute any criminal offence against the financial interests of the EU.¹⁸³ This means that the EPPO will handle all the offences against the financial interests of the EU and will be able to discover certain cross-border links which might not be noticed in purely national investigations. As the EPPO would thus have an overview of all the available information, it will be able to direct and coordinate the investigations more effectively and

¹⁸² European Commission, “European Parliament committee backs European Commission proposal for a European Public Prosecutor’s Office”, memo/14/102, Brussels, 11 February 2014, <http://europa.eu/rapid/press-release>, accessed 3 April 2014.

¹⁸³ Article 14 proposed EPPO regulation.

possibly come across links with other financial crimes and criminals, exposing large chains of organised crime.¹⁸⁴

2.2.3. Binding requests for investigations and prosecutions

When reading the EPPO proposal it becomes immediately clear that the EPPO will have enforceable powers because the competent authorities of the Member States must actively assist and support the investigations and prosecutions of the EPPO and must comply with its requests. They shall also refrain from any action, policy or procedure which may delay or hamper the progress.¹⁸⁵ Through these binding powers the EPPO will be able to provide a solution for the low level of prosecution caused by the low priority Member States give to these cases. A binding request of the federal EPPO will leave the Member States without a choice, forcing them to investigate/prosecute these crimes against the EU's financial interests. REDING¹⁸⁶ made thus an appropriate statement in saying that a federal budget needs federal protection.

2.2.4. Efficient coordination of investigations

A central placed EU body will enhance the information exchange. The need for complex and time-consuming MLA and MR procedures will be reduced because cooperation between the Member States can be reached through normal contacts with colleague prosecutors working within the same structure of the EPPO.¹⁸⁷ Since the MLA and MR requests will no longer be the only option, the problems of refusals and the lack of involvement of national prosecutors will decrease.

2.2.5. Evidence admissibility

As mentioned above, the current problem of admissibility of cross-border obtained evidence is one of the main reasons for the reluctance of Member States to cooperate with each other. The EPPO proposal tries to solve this admissibility problem with the provision in Article 30 that evidence gathered lawfully in one Member State is admissible in the trial courts of all Member States without

¹⁸⁴ European Commission, Communication from the European Commission to the European Parliament, the Council and the National European 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, Brussels, 27 November 2013, p. 9, <http://ec.europa.eu/>, accessed 5 March 2014.

¹⁸⁵ Articles 11 (7) and 18 (1) proposed EPPO regulation.

¹⁸⁶ Viviane Reding is the EU's Commissioner for Justice and vice-president of the European Commission.

¹⁸⁷ European Commission, Communication from the European Commission to the European Parliament, the Council and the National European 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, Brussels, 27 November 2013, p. 9, <http://ec.europa.eu/>, accessed 6 March 2014.

any validation even if the national law of the Member State where the court is located provides for different rules. The only exceptions to that rule are if the evidence would be against the rules of fair trial in the Member State or if the rights of the defendant were disrespected.

Also, in this way the EPPO will possibly provide a boost for the needed approximation¹⁸⁸. With a system of automatic admissibility of evidence, the familiarity with each other's criminal justice systems will increase. This familiarity will possibly lead to more trust, which will stimulate the willingness of Member States to gradually approximate their national laws. However this is not a one-way-street because a certain level of approximation is necessary to make this automatic admissibility of evidence work. There are still a lot of differences between the Member States' practices so the fact that evidence gathered by the EPPO is admissible without any validation will only be accepted if it were to be accompanied by some form of minimum common standards for gathering evidence.¹⁸⁹

2.3. Other advantages of the EPPO

2.3.1. Pool of resources, expertise and know-how

An EPPO that will be exclusively competent for offences affecting the financial interests of the EU, will be able to specialise in the matter and gather a lot of expertise and know-how. However, this does not mean that the EPPO will be a distant supervisor with only theoretical knowledge on the matter. Being probably a decentralised office, the EPPO will ensure proximity of action to the place of crime because of the connection the European delegated prosecutors¹⁹⁰ will have with their specific Member State.

2.3.2. Respecting the rule of law¹⁹¹

The proposed EPPO regulation ensures in the Articles 32-35 the respect for fundamental rights of the Charter of Fundamental Rights of the European Union¹⁹², providing an unprecedented high level of

¹⁸⁸ For more information on this, see *supra*, part II: Problems in the current prosecution, 2. Low prosecution level, 2.1.3. Partial solution: Stepping up approximation.

¹⁸⁹ For more information on this, see *infra*, Chapter four: The feasibility of the EPPO, part II: How the EPPO would function in practice, 3. Procedural aspect, 3.1. Applicable rules, 3.1.1. Specific European rules, b. Admissibility of evidence.

¹⁹⁰ Hereafter: delegated prosecutors.

¹⁹¹ European Commission, Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee on the Regions – Better protection of the Union's financial interests: Setting up the European Public Prosecutor's Office and reforming Eurojust, COM (2013) 532 final, Brussels, 17 July 2013, p. 6, <http://ec.europa.eu/>, accessed 8 March 2014.

protection for the involved individuals and companies by ensuring EU procedural safeguards.¹⁹³ Also, according to Article 26 (4 and 5) of the proposed EPPO regulation, intrusive investigation measures shall be subject to judicial authorisation by the competent national court, bringing a consistent degree of security to the procedural rights of EU citizens. Not only with regard to the investigative measures but also with regard to the admissibility of evidence the fundamental rights play a key role. The evidence will in fact only be admissible if it would not adversely affect the fairness of the procedure or the rights of defence as enshrined in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union.¹⁹⁴

2.4. Conclusion

The EPPO will provide a genuine added value as it will most probably solve the current problems in investigating and prosecuting crimes of EU fraud. It will put an end to the varying level of prosecution in the Member States because it will initiate the investigations itself so that this decision is no longer left to the appreciation of Member States. Also, the EPPO will provide a common EU policy so that the definition of offences against the financial interests will be common in all Member States, insuring coherence and consistency.

Also the low levels of prosecution of crimes against the financial interests of the EU will be raised by the EPPO. The solution for the jurisdiction conflicts is set out in Article 27 (4) of the proposed EPPO regulation: *“the EPPO shall choose the jurisdiction of trial and determine the competent national court”*. As the EPPO will exclusively decide in which Member State the prosecution and trial will take place, there will no longer be conflicts of jurisdiction.

The second reason for the low prosecution rates is that the international cooperation is very time-consuming because of certain deficiencies: problems with evidence, national restrictions and negative attitudes towards prosecution, and the fact that the powers of the existing EU bodies are limited. These deficiencies will be solved through the creation of an EPPO. The problem of admissibility of evidence in MLA and MR procedures is supposed to be solved by the provision that evidence lawfully gathered by the EPPO will automatically be admissible. The low prosecution level caused by national restrictions and negative attitudes will also be overcome by the EPPO as it would have binding powers to investigate and prosecute.

¹⁹² Charter of Fundamental Rights of the European Union, 2000/C 364/01, *Official Journal of the European Communities*, C 364, 18 December 2000.

¹⁹³ Such as the right to a lawyer, the right for legal aid and the right to be presumed innocent.

¹⁹⁴ Article 30 (1) proposed EPPO regulation.

Chapter three: The desirability of the EPPO

- Why an independent EPPO and not just the extension of Eurojust's mandate -

“Although Article 85 TFEU offers possibilities to transform Eurojust from a simple mediator at horizontal cooperation level to a player with certain binding operational powers at vertical integration level, the changes announced will nevertheless remain limited because, unlike Article 86 TFEU, the centre of gravity for investigations and prosecutions would still not be transferred to the EU level.”

A. WEYEMBERGH¹⁹⁵, 2010.¹⁹⁶

I. Legal basis & critique

In 2007, the Treaty of Lisbon incorporated two very important articles in the TFEU, namely Articles 85 and 86. Article 85 TFEU holds the possibility to further develop Eurojust.¹⁹⁷ Article 86 is entirely devoted on the EPPO and states that the Council of the European Union may establish an EPPO “*from Eurojust*”. This sentence indicates that there is a certain link between the EPPO and Eurojust. Therefore a natural question comes to mind: whether at the frontline of the evolution of the European criminal justice area there should be an independent EPPO or a strengthened Eurojust.

This dilemma became the basis of a widespread critique on the idea of the EPPO: it is not efficient nor logical to go through the trouble of creating a new institution with all sorts of expenses and time-consuming procedures, when you can increase the powers of an existing authority that already handles in the area of improving cooperation and prosecution in serious cross-border crimes.

¹⁹⁵ Anne Weyembergh is a full time Professor at the ULB. She has founded and coordinates the European Criminal Law Academic Network and is the coordinator of the IEE-ULB team on European criminal law.

¹⁹⁶ Report Strategic Seminar, “Eurojust and the Lisbon Treaty: Towards more effective action”, Bruges, 20-22 September 2010, *New Journal of European Criminal Law*, vol. 2, issue 1, 2011, p. 105-106.

¹⁹⁷ Article 85 TFEU: “*These tasks may include: (a) initiating investigations, (b) coordinating investigations and prosecutions, (c) strengthening of judicial cooperation*”.

With the recent EPPO proposal, the creation of the latter will soon become reality. However, the criticisms put forward still have not ceased. The opponents of the EPPO argue that an EPPO is no longer needed if Eurojust's mandate were to be extended.¹⁹⁸ NILSSON calls this "a *paradox: the more successful Eurojust is, the less there will be a need for a European public prosecutor*".¹⁹⁹ The following pages will analyse whether the policymakers' choice in adopting a new office for the European Public Prosecutor was justified and why the horizontal way of cooperation of Eurojust is insufficient to protect the financial interests of the EU.

II. Reasons why a strengthened Eurojust is not enough

1. Insufficient powers

1.1. Eurojust Decision of 2002

Upon a first reading of the Council Decision of 2002 on the setting up of Eurojust²⁰⁰ it is immediately clear that the proposed competences of the EPPO overlap with those of Eurojust. Article 4 of the proposed EPPO regulation states that "*the EPPO's task shall be to combat criminal offences affecting the financial interests of the Union*". Article 4 of the Eurojust Decision shows the types of crime that fall within the competence of Eurojust, and amongst those are "*fraud and corruption and any criminal offence affecting the European Community's financial interests*".²⁰¹ Immediately the question arises as to why a new office is necessary when its competences overlap with those of the existing Eurojust. Although it is correct that the EPPO would not be of great added value subject-wise, its true importance lies in the fact that it could do much more task-wise. The EPPO does not operate more broadly than Eurojust, it operates more deeply.

This is because Eurojust's powers are strictly non-binding. Looking at the Eurojust Decision it is a striking fact that Eurojust cannot itself take the initiative to order investigative measures but needs to be requested by the Member States.²⁰² Also, when Eurojust becomes involved in a case, under no

¹⁹⁸ V. MITSILEGAS, *EU Criminal Law*, Oxford, Hart Publishing, 2009, p. 188-191.

¹⁹⁹ H. G. NILSSON, "Judicial cooperation in the EU – Eurojust and the European Public Prosecutor", in E. GUILD, S. CARRERA and A. EGGENSCHWILER (eds.), *The Area of Freedom, Security and Justice Ten Years on: Successes and Future Challenges Under the Stockholm Programme*, Centre for European Policy Studies, 2011, p. 77.

²⁰⁰ Council of the European Union, Decision on setting up Eurojust with a view to reinforcing the fight against serious crime, 2002/187/JHA, 28 February 2002, *Official Journal of the European Communities*, L 63, 6 March 2002. Hereafter: Eurojust Decision.

²⁰¹ Eurojust Decision, p. 3.

²⁰² *Ibid*, Art. 5.

circumstances can it go further than advising, assisting, asking the member states, coordinating and enhancing cooperation, providing information, supplying support, and so on.²⁰³ These are all so called ‘soft powers’, which means that Eurojust is only a facilitator and a mediator without any decision-making powers vis-à-vis national authorities.²⁰⁴ The outcome of its intervention is heavily dependent on its power of persuasion. If the national authorities fail to comply, Eurojust may record this but does not have any means at its disposal for obliging them to comply.²⁰⁵

The EPPO on the other hand would have binding powers to initiate and conduct investigations. Article 16 of the proposed EPPO regulation states out the right to initiate: “*The EPP shall initiate an investigation where an offence within its competence is being or has been committed*”. In Article 26 of the proposed EPPO regulation the EPPO’s powers to order investigative measures are defined: “*The EPPO shall have the power to request or to order the following investigative measures when exercising its competence...*”. The EPPO will also be competent to prosecute and bring cases to national courts in a binding manner. This is set out in Article 27 of the proposed EPPO regulation: “*The EPP shall have the same powers as national public prosecutors in respect of prosecution and bringing a case to judgement*”. These articles illustrate that the powers of the EPPO would go a lot further than the soft powers of Eurojust.

1.2. Revised Eurojust Decision of 2008²⁰⁶: failure

1.2.1. Still non-binding

In 2008, improvement seemed to be on its way. The Council of the European Union had launched a decision to strengthen Eurojust and to amend the Eurojust Decision of 2002. Unfortunately, when the implementation period ended on 4 June 2011, not all Member States had implemented this decision. And even if they had, although the intentions of this Revised Eurojust Decision seemed promising (“*the time has come to ensure that Eurojust becomes more operational*”)²⁰⁷, this decision

²⁰³ *Ibid*, Art. 6 and 7.

²⁰⁴ G. VERMEULEN, W. DE BONDT and C. RYCKMAN, “Eurojust and its relevance in the debate on a future European Public Prosecutor’s Office”, in *Rethinking international cooperation in criminal matters in the EU*, Antwerpen, Maklu, 2012, p. 374.

²⁰⁵ A. WEYEMBERGH, “Coordination and initiation of investigations and prosecutions through Eurojust”, *ERA Forum*, 2013, p. 178.

²⁰⁶ Council of the European Union, 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, 2009/426/JHA, 16 December 2008, *Official Journal of the European Union*, L 138, 4 June 2009.

²⁰⁷ Revised Eurojust Decision, p. 1.

missed its purpose to strengthen Eurojust as it did not really change the non-binding nature of its powers. Two articles are being analysed to demonstrate this.

The Revised Eurojust Decision added the following paragraph to Article 7 of the Eurojust Decision of 2002: *“Where two or more national members cannot agree on how to resolve a case of conflict of jurisdiction, the College shall be asked to issue a written non-binding opinion on the case”*.²⁰⁸ There are two elements in this paragraph that emphasise the still soft powers of Eurojust. First of all, Eurojust still needs to be asked by the Member States and has no initiating powers. Secondly, the opinion that the college would provide would still be non-binding. What also demonstrates the still soft character of Eurojust’s powers, is the new Article 8 foreseen by the Revised Eurojust decision: *“If the competent authorities of the Member States concerned decide not to comply with a request or not to follow a written opinion, they shall inform Eurojust of their decision and of the reasons for it”*.²⁰⁹ And even if the Member States do not provide sufficient justification for non-compliance, operational reasons can be resorted to. This all seems quite easy to deviate from Eurojust’s requests.

To conclude, although the Revised Eurojust Decision intended well, it missed its purpose in practice, which only confirms the fact that an EPPO would be equipped with stronger decision-making and operational powers.

1.2.2. Timing of the decision

What must be mentioned is the prominent timing of this decision, which was taken irrespective of the changes to the regulatory environment to be brought about by the new Lisbon Treaty. When the revision of the 2002 Decision began in 2008, the Treaty of Lisbon was still awaiting to enter into force. It was on the eve of the entry into force of the Lisbon treaty that Member States decided not to wait for a proposal from the European Commission and instead initiated their own proposal based on the previous TEU.²¹⁰ The Lisbon Treaty was to open up a number of uncharted possibilities to empower Eurojust, so the fact that Member States adopted this decision at the last possible moment proves that the Member States wanted to leave Eurojust with its soft powers and provide in this decision the maximum level of powers for Eurojust. This can be interpreted as a strong political message that Member States are not willing to genuinely change the nature of Eurojust and that they are satisfied with Eurojust as it is.

²⁰⁸ *Ibid*, p. 4.

²⁰⁹ *Ibid*, p. 5.

²¹⁰ European Parliament (Directorate-General for internal policies), “The future of Eurojust”, 2012, p. 100, <http://www.europarl.europa.eu/committees/en/studies.html>, accessed 3 March 2014.

1.3. Art. 85 TFEU: strengthening Eurojust, but still not sufficient

Article 85 TFEU proposes additional powers for Eurojust: *“The European Parliament and the Council shall determine Eurojust’s structure, operation, field of action and tasks. These tasks may include: (a) the initiation of criminal investigations, as well as proposing the initiation of prosecutions; (b) the coordination of investigations and prosecutions; (c) the strengthening of judicial cooperation”*. Supporters of Eurojust argue that this provision abrogates the need for an EPPO.

At the ERA conference in November 2012 the preferred scenarios for the strengthening of Eurojust were set forward. A medium scenario was considered best for the initiation of investigations: Eurojust would be able to order national authorities to undertake an investigation but the case would be immediately transferred to the Member States. A more ambitious scenario was considered best for the coordination of investigations: Eurojust would have binding powers of coordination to order national authorities to implement decisions agreed at coordination meetings. However, it was clear that these scenarios would bring along several issues, including the difficulties these binding powers of Eurojust would bring to its structure and the trust-relationship²¹¹ that had been built between Eurojust and the national authorities of the Member States. It was thus already clear then that providing Eurojust with binding powers would best be kept as an *ultima ratio*.²¹²

In July 2013 the European Commission took action with its proposal for a Regulation on Eurojust.²¹³ The main focus in this proposal lies on the strengthening of the operational powers of Eurojust. But although this sounds promising, again no real powers are foreseen for Eurojust, which is obvious in the wording of Article 4 (2) of the proposed Eurojust regulation: *“Eurojust may ask the competent authorities of the Member States to...”*. Another sign that this proposal does not really strengthen Eurojust but rather encourages its support-role towards the EPPO is the focus on the relationship between Eurojust and the EPPO. The European Commission even declares literally in its Staff Working Document of July 2013 that *“the proposal on the reform of Eurojust will establish a link between Eurojust and the EPPO. However, it would not affect the powers of Eurojust to deal with offences affecting the Union’s financial interests, and it therefore could not contribute in a tangible*

²¹¹ For more information on this, see *infra*, 2. Strengthening Eurojust = changing Eurojust.

²¹² Council of the European Union, “10 years of Eurojust – Operational Achievements and Future Challenges”, Eurojust/ERA conference, 8862/13, The Hague, 12-13 November 2012, p. 5, <http://eurojust.europa.eu>, accessed 16 April 2014.

²¹³ European Commission, Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Criminal Justice Cooperation (Eurojust), COM (2013) 535 final, Brussels, 17 July 2013, <http://eur-lex.europa.eu/>, accessed on 14 November 2013.

way to a more uniform protection of the financial interests of the EU".²¹⁴ So the die was cast. The objectives of the two proposals of 2013 provide a clear sign that an EPPO is needed, with a Eurojust on its side.

And even if the possibilities provided in Article 85 TFEU were to be fully realized, this would not suffice to argue that the EPPO would be a less desirable path. Because when comparing the wording of Article 85 TFEU and Article 86 TFEU, it is easy to conclude that even if Eurojust's powers were strengthened and it would have the maximum possible powers the TFEU allows, it would still be an intergovernmental body without executive powers, not able to initiate prosecutions or bring cases to national courts.²¹⁵ According to Article 85 (2) TFEU the formal acts of judicial procedure would remain the exclusive prerogative of the competent national officials. This would mean that even if Eurojust could initiate proceedings, directing them would still be in the hands of national services applying national law²¹⁶. The European Commission concludes in its Communication of 2013 that *"even if the maximum use had been made of Article 85 TFEU, the powers of the EPPO go beyond what Eurojust could ever do"*.²¹⁷

The question arises as to whether it is necessary that powers of EU bodies go beyond the initiation and resolving of conflicts of jurisdiction. The answer is affirmative! In view of the problems in the current prosecuting situation it is essential that there comes into motion a supranational prosecuting office to conduct the investigations and initiate prosecutions. It is the problem about the unwillingness of Member States to prosecute cross-border cases that will not cease to exist when the only binding power is to initiate the investigation. Because it has been set out above that although it is now already the case that Member States often initiate investigations, they drop it from the moment the cross-border dimension becomes a hampering factor. Without binding powers to actually direct the investigations and propose prosecution, Eurojust will not be able to solve this. It is

²¹⁴ European Commission, 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, Brussels, 17 July 2013, p. 32, <http://ec.europa.eu/>, accessed 8 March 2014.

²¹⁵ *Ibid*, p. 25.

²¹⁶ *Ibid*, p. 31.

²¹⁷ European Commission, Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM (2013) 534, Brussels, 17 July 2013, p. 53; European Commission, Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee on the Regions – Better protection of the Union's financial interests: Setting up the European Public Prosecutor's Office and reforming Eurojust, COM (2013) 532 final, Brussels, 17 July 2013, p. 4.

exclusively the EPPO with enforceable conducting powers that will be able to decide, independently from anyone else, whether a fraud case should be dropped.²¹⁸

2. Strengthening Eurojust = changing Eurojust

Eurojust currently reflects the horizontal cooperation model, tasked to coordinate between national authorities without being directly involved in the national investigations and prosecutions. The current structure and organisation of Eurojust perfectly mirrors these tasks, so any genuine change to the powers of Eurojust would necessarily entail a drastic change to its current structure.²¹⁹ Also, it is broadly known that Eurojust operates as an informal network, mostly leaving its formal capacities untouched.²²⁰ Should such informal business be regarded as essential for getting national authorities to cooperate, then the necessary conclusion is that the current structure itself hinders any serious empowerment of Eurojust. So should Eurojust be gifted with binding powers, the current horizontal structure and informal way of cooperation would change drastically because they are incompatible with binding powers. But the question is whether Member States support a change in such a good functioning body because it is strongly argued by many that the close cooperation between Eurojust and Member States would be lost if the existing structure is changed.

In a seminar on a new draft regulation on the extension of Eurojust²²¹, it was very remarkable that the majority of the participants are satisfied with what Eurojust currently handles and are of the opinion that its principal strength lies within its coordination role. A large part of the discussion in this seminar was about the relation between Eurojust and the EPPO. Seeing that both Eurojust and the EPPO would deal with crimes against the financial interests of the EU, the risk of overlapping competences and decreasing effectiveness of Eurojust requires careful consideration. That is why the parties in this seminar agreed that to assure the complementarity between these bodies, the focus of the extension of Eurojust must lie on the operational and administrative support to the EPPO. Also in

²¹⁸ H. BRADY, "Does the EU need its own Public Prosecutor?", 29 October 2013, <http://www.opensocietyfoundations.org/>, accessed 3 March 2014.

²¹⁹ European Parliament (Directorate-General for internal policies), "The future of Eurojust", 2012, p. 39, <http://www.europarl.europa.eu/committees/en/studies.html>, accessed 3 March 2014.

²²⁰ In 2011, only 14 formal requests were recorded - Eurojust, Annual Report 2011, p. 18, <http://eurojust.europa.eu/>, accessed 7 March 2014.

²²¹ Eurojust seminar on new draft Regulation, "An improvement in the fight against cross-border crime?", Press release, The Hague, 16 October 2013, <http://eurojust.europa.eu/press/PressReleases/Pages/2013/2013-10-16.aspx>, accessed 13 November 2013.

various other documents²²² is proclaimed that Eurojust would be of great importance to provide services and information to the EPPO.²²³

From this can be deducted that Eurojust might not need as many changes as originally suggested. Maybe it is better to let Eurojust be this non-binding body to which Member States can turn to when they need advice and assistance. Granting Eurojust with enforceable powers might even scare off Member States, resulting in a less accessible Eurojust.

3. Lack of independency

Eurojust's structure is hybrid, showing both national and European features and consisting of national members and a college. As stated in the Eurojust decision "*the national members shall be subject to the national law of their Member State as regards their status*" and "*each Member State shall define the nature and extent of the judicial powers it grants its national member within its own territory*".²²⁴ This means that the Member States are the ones who decide on the power of their national members, who are fully embedded within their national authorities. National members are in no way independent from their national authorities and are thus not in a position whatsoever to instruct or impose, let alone go against, their seconding authorities. This lack of independency has several consequences which will be explained in 3.1, 3.2 and 3.3. In 3.4 will be demonstrated that the EPPO will be a fully independent office.

3.1. Diverging execution of Eurojust decisions

The college, which consists of the national members from all the Member States, is the decision-making body of Eurojust. The college takes orders and the national members have to execute them but because of the divergent national laws, this does not mean that the decisions will be consistently applied in all the Member States. The national member, still being part of the national system of

²²² European Commission, Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM (2013) 534, Brussels, 17 July 2013, p. 53; European Commission, Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee on the Regions – Better protection of the Union's financial interests: Setting up the European Public Prosecutor's Office and reforming Eurojust, COM (2013) 532 final, Brussels, 17 July 2013, p. 9.

²²³ European Commission, 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, Brussels, 17 July 2013, p. 41, <http://ec.europa.eu/>, accessed 17 November 2013.

²²⁴ Eurojust Decision, Art. 9.

his/her Member State, is not independent enough to ensure complete protection of the EU interests as national interests and politics may interfere with his/her work.²²⁵

3.2. Diverging powers of national members

Beyond a number of basic tasks and a list²²⁶ of minimum powers, the additional powers granted to the national members by the national authorities differ significantly.²²⁷ This varying nature of powers originates from the fact that there are significant variations in national criminal justice systems concerning the powers of the agencies from which the national member was drawn, with investigative and prosecutorial tasks allocated in differing ways among the police and the prosecution services.²²⁸

3.3. Inadequate flow of information

A great concern was the threat this dependency from the national authorities posed to the adequate flow of information between Eurojust and Member States. Relevant information could be lost due to the lack of power granted to the national member, who in principle was supposed to be the broker of all information exchanges between his competent authority and Eurojust. The European Commission draws to the attention in its report of 2004²²⁹ that national members' access to information on investigations and prosecutions is indispensable for Eurojust to operate successfully.²³⁰

3.4. How independency in the EPPO will be ensured

The EPPO on the other hand, would be able to function more objectively due to its independent nature. This is literally taken up in the EPPO proposal as one of the most important elements: *“Among the key features of the EPPO, the text refers to independence and accountability, which*

²²⁵ European Commission, 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, Brussels, 17 July 2013, p. 41, <http://ec.europa.eu/>, accessed 20 February 2014.

²²⁶ Revised Eurojust Decision, Art. 9 (a,b,c and d).

²²⁷ See the record on the term of office, the judicial powers and the prerogatives of the national members of Eurojust, in European Parliament (Directorate-General for internal policies), “The future of Eurojust”, 2012, p. 220, <http://www.europarl.europa.eu/committees/en/studies.html>, accessed 9 March 2014.

²²⁸ European Parliament (Directorate-General for internal policies), “The future of Eurojust”, 2012, p. 23, <http://www.europarl.europa.eu/committees/en/studies.html>, accessed 28 February 2014.

²²⁹ European Commission, Report from the Commission on the legal transposition of the Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, COM (2004) 457 final, Brussels, 6 July 2004, <http://eur-lex.europa.eu>, accessed 28 February 2014.

²³⁰ European Parliament (Directorate-General for internal policies), “The future of Eurojust”, 2012, p. 24, <http://www.europarl.europa.eu/committees/en/studies.html>, accessed 28 February 2014.

should guarantee that it is able to exercise its functions and use its powers in a way that makes it immune from any improper influence".²³¹ According to the European Commission, the independence of the EPPO will be ensured in three ways. Firstly, it is stated in Article 5 of the proposed EPPO regulation that "the EPPO shall neither seek nor take instructions from any person, any Member State or any institution, body, office or agency of the Union in the performance of their duties".²³² Also, in Article 6 (5) it is stated that "the European Delegated Prosecutors shall act under the exclusive authority of the EPP and follow only his/her instructions. When they act within their mandate under this Regulation, they shall be fully independent from the national prosecution bodies and have no obligations with regard to them".²³³ In case there is a conflict of interests, this will be settled by the EPP. The work of the delegated prosecutors on cases for the EPP will always take precedence over national cases and they cannot be dismissed without the consent of the EPP.²³⁴ Even though the delegated prosecutors will be fully independent from the national authorities when they act on behalf of the EPPO, they will be wearing a 'double hat': they will not only be subject to the instructions from the EPP, they will also keep their functions and duties at national level.

Some critics have raised their doubts about this 'double hat' and wondered whether this is realistic in practice. Because it is a fact that some Member States have a very hierarchical prosecution service in which the delegated prosecutor will have to obey to his/her national superiors.²³⁵ Article 6 (4 and 5) of the proposed EPPO regulation states that the delegated prosecutor is under the exclusive authority of the EPP. The EPPO will be superior to the national prosecution services²³⁶ and enjoys immunity²³⁷. So it seems obvious that some delegated prosecutors, who will have to obey to a national superior and to the EPP, will encounter troubles in serving two systems at a different level. As the EPPO will prevail over the national services, it will be a difficult task for delegated prosecutors

²³¹ European Commission, Proposal for a Council Regulation on the establishment of a European Public Prosecutor, COM (2013) 534 final, Brussels, 17 July 2013, p. 5, <http://eur-lex.europa.eu/>, accessed 15 November 2013.

²³² *Ibid*, p. 17.

²³³ *Ibid*, p. 18.

²³⁴ European Commission, "Every euro counts. Frequently Asked Questions on the European Public Prosecutor's Office", memo/13/693, Brussels, 17 July 2013, p. 5, <http://europa.eu/rapid/press-release>, accessed 27 March 2014.

²³⁵ A. KLIP, "Een Europees Openbaar Ministerie", Ed., DD, 2013, afl. 9, p. 650.

²³⁶ Article 11 (7) proposed EPPO regulation.

²³⁷ Article 54 (4) proposed EPPO regulation.

to keep functioning as they should on national level because they will quickly lose connection with the national system.

Secondly, as the EPPO is organised in the EPPO proposal as a separate decentralised entity, it will be structurally independent because it will not be integrated into another institution or service of the EU.²³⁸ And thirdly, Article 8 (1) of the proposed EPPO regulation states that the appointment of the EPP involves the Council of the European Union and the European Parliament. Also, opinions of former members of the Court of Justice, members of national supreme courts, national public prosecution services and/or lawyers of recognised competence are included.²³⁹ These Union institutions and competent specialists ensure a high degree of independence in the EPPO. Also, the EPP's term of office is limited to eight years and is not renewable, which ensures that the EPP will not be guided by considerations of being re-appointed. Finally, Article 8 (4) points out that the EPP can be dismissed by the Court of Justice, should he/she no longer fulfil the conditions required for the performance of his/her duties. This means that the EPP can be dismissed if doubts were raised about his/her independence.²⁴⁰

4. Broad scope

The mandate of Eurojust is broader than the crimes affecting the financial interests of the EU. As stated in Article 4 of the Eurojust Decision, Eurojust is *inter alia* competent for “*the types of crime and the offences in respect of which Europol is at all times competent to act*”²⁴¹, which also includes crimes like drug trafficking, terrorism, smuggling, racism, and so on.²⁴² Binding powers over crimes affecting the financial interests of the EU seem acceptable, as a federal budget requires federal measures. But if Eurojust would be gifted with binding powers, they would cover all the above mentioned crimes and its mandate would reach too far. Eurojust would trespass over the Member

²³⁸ For more information on this, see *infra*, Chapter four: The feasibility of the EPPO, part II: How the EPPO would function in practice, 1. Organisation and structure, 1.2. European Commission: Decentralized EPPO, 1.2.2. Features of a decentralized EPPO.

²³⁹ Article 8 (3) proposed EPPO regulation.

²⁴⁰ European Commission, “Every euro counts. Frequently Asked Questions on the European Public Prosecutor’s Office”, memo/13/693, Brussels, 17 July 2013, p. 5, <http://europa.eu/rapid/press-release>, accessed 27 March 2014.

²⁴¹ Revised Eurojust Decision, Art. 4 (1).

²⁴² Council of the European Union, Decision establishing the European Police Office (Europol), 2009/371/JHA, 6 April 2009, *Official Journal of the European Union*, L 121, 15 May 2009, Art. 4.

States' sovereignty because binding powers over crimes which cause no problems for prosecution on national level would be in breach of the subsidiarity principle.

The advantage of an EPPO would be that this prosecutor would probably only be competent for crimes affecting the financial interests of the EU²⁴³, because surprisingly these are crimes on which Member States focus the least. The fact that a European Prosecutor would handle these cases is thus nor a violation of the subsidiarity principle, nor is it an unacceptable intrusion in the national systems of the Member States. What they do not solve themselves, they cannot stop from being solved by the EPPO.²⁴⁴

Furthermore, the advantage of having a dedicated office dealing with crimes affecting the budget of the EU is that such office would be able to acquire all relevant knowledge regarding such crimes. Eurojust would need to focus on many crimes and divide its attention over the many aspects of its diverse workload so that its observation of this important type of crime would not be as thorough as it would be by the EPPO, which would be more specialised in this matter.

5. Time-consuming & incomplete

Eurojust's functioning is time-consuming. First of all, as Eurojust decides as a college of 28 members, it will experience more delays in the decision making process than the single European Prosecutor. Secondly, Eurojust often becomes involved only at a later stage of the proceedings, which is largely the result of the institutional design of the body. Two main causes for this late involvement of Eurojust can be listed.

The first cause is that Eurojust currently has no initiating powers and depends on the timing of the Member States' requests for assistance. Making Eurojust a last resort is a very time-consuming rule, as Member States often waste a lot of time before they decide they cannot prosecute the case and request Eurojust's interference. Concrete cases given by OLAF in a Staff Working Document of the European Commission²⁴⁵ illustrate that Member States often delay the prosecution of crimes against

²⁴³ For more information on this, see *infra*, Chapter four: The feasibility of the EPPO, part II: How the EPPO would function in practice, 2. Competence, 2.1. Material scope.

²⁴⁴ After all, the obligation for the Member States in Article 325 TFEU to counter fraud and other offences against the financial interests of the EU, makes it necessary to act in any way: at the level of the Member States or at EU level.

²⁴⁵ European Commission, Commission Staff Working Paper to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Accompanying the document Communication from the Commission on the protection of the financial interests of the European Union by criminal law and by administrative investigations: An integrated policy to safeguard taxpayers' money, SEC (2011) 621 final, Brussels, 26 May 2011, p. 9, <http://eur-lex.europa.eu/>, accessed on 26 November 2013.

the EU budget. For example, OLAF testifies: *“The concerned person moved from state to state. Member State A appeared to be the most appropriate jurisdiction for prosecution, so the other Member States did not bother to handle the case. However, the prosecutors in A declined the case on grounds of lacking jurisdiction – 2 years after the papers were sent to them”*.²⁴⁶ Eurojust would only be able to take initiative when the Member State decides to request Eurojust for assistance, so in this case probably after 2 years. The point is, when waiting until the Member States themselves decide when they *“can’t or won’t”* prosecute, Eurojust might have to wait a very long time before it can start its activities. Things would go a lot faster with a European Prosecutor, who at any time there is a crime against the EU budget can take initiative and binding measures.

Not only does the fact that Eurojust has to await the requests of Member States often mean that there is a lot of time wasted, it also means that not all cases of misuse of EU funds investigated at national level are referred to Eurojust. Eurojust’s mode of operation on request obviously entails important gaps and is incomplete. The EPPO on the other hand will ensure a complete and thorough approach as it will ensure effective prosecution of every crime against the financial interests of the EU.

The second cause for Eurojust’s late involvement is the possible lack of knowledge of the national members at Eurojust.²⁴⁷ National members have varying backgrounds and remain within the structure of the criminal justice system of their own countries. This can lead to the practice that the case can be in an advanced stage of the prosecution but the national member can have no single piece of information because in its national system it is not yet competent to be notified about it. For example, if an investigation is made by the police and the national member happens to be a prosecutor, in a system where prosecutorial services do not receive information about the investigation before a formal charge is made, the national member will simply not have information about the investigation to provide to Eurojust.

III. Conclusion

Strengthening Eurojust through the implementation of Article 85 TFEU seems cost-and time-saving but there are many arguments as to why Eurojust would not be able to establish the perfect protection of the financial interests of the EU. Amongst those are the fact that Eurojust’s scope is too broad, its lack of independency and its time-consuming way of functioning. The main argument is

²⁴⁶ *Ibid*, p. 3.

²⁴⁷ European Parliament (Directorate-General for internal policies), “The future of Eurojust”, 2012, p. 64, <http://www.europarl.europa.eu/committees/en/studies.html>, accessed 3 March 2014.

that Eurojust will never have binding powers similar to those of an EPPO because of the lack of political consensus and the lack of a legal basis.

Firstly, granting binding powers to Eurojust goes completely against its philosophy and structure, so it is suggested that if Eurojust would be attributed with the stronger powers offered in Article 85 TFEU, a fundamental change to its current structure and powers is inevitable. The question is whether this would yield a more efficient body, taking into account the fact that the majority of the Member States thinks of the current Eurojust as a well-functioning and accessible body.

Secondly, even if Member States would agree to completely change Eurojust's structure and powers, an explicit legal basis for a Eurojust with binding conducting powers of investigation and prosecution is lacking. So even if Eurojust would be reformed in the future and would have the maximum possible powers that the TFEU allows, it would only be competent to initiate proceedings but directing them would still be in the hands of national services.

This chapter makes it easy to conclude that granting Eurojust with the necessary binding conducting powers is: not desirable, not allowed, and not sufficient. Not desirable because providing Eurojust with such binding powers would entail changing it fundamentally and that is not what Member States prefer. Not allowed because Article 85 TFEU only foresees binding initiating powers for Eurojust. And lastly, not sufficient because even if Eurojust was given the maximum possible powers the TFEU allows it to have, the current problems would still not be solved. It is thus crystal clear that setting up an EPPO is desirable because only the EPPO can be the necessary supranational body with operative jurisdiction in the EU.²⁴⁸ However, the EPPO does not have the slightest intention to try and replace Eurojust but rather to establish close cooperation with it.

The options in Articles 85 and 86 TFEU are not supposed to be considered as a choice that needs to be made. In the Stockholm Programme²⁴⁹ two main approaches were identified: the parallel approach proclaims that the further development of Eurojust and the creation of an EPPO should be carried out simultaneously. According to the step-by-step approach, the implementation of the Revised Eurojust Decision must first be evaluated before exploring further developments under Article 85 TFEU, and only at the last stage the establishment of an EPPO can be discussed. The European Commission obviously favours the parallel approach since it considers that the two

²⁴⁸ K. LIGETI and M. SIMONATO, "The European Public Prosecutor's Office: Towards a Truly European Prosecution Service?", *New Journal of European Criminal Law*, vol. 4, issue 1-2, 2013, p. 12.

²⁴⁹ European Council, The Stockholm Programme – An open and secure Europe serving and protecting citizens, 4 May 2010, *Official Journal of the European Union*, C 115, 4 May 2010.

processes are complementary and different functions are at stake.²⁵⁰ Both the establishment of an EPPO and the strengthening of Eurojust are needed measures, without abrogating each other. The Articles 85 and 86 TFEU are thus complementary provisions that need to be developed in parallel to conceive a coherent system and avoid overlapping competences.

²⁵⁰ Report Strategic Seminar, “Eurojust and the Lisbon Treaty: Towards more effective action”, Bruges, 20-22 September 2010, *New Journal of European Criminal Law*, vol. 2, issue 1, 2011, p. 113.

Chapter four: The feasibility of the EPPO

- How the EPPO will be established -

“This is an exciting time for European criminal law and international cooperation in criminal matters.

Article 86 TFEU will implement changes that will be milestones in shaping a European area of freedom, security and justice, keeping its citizens safe and putting criminals behind bars.”

M. CONINSX²⁵¹, 2013.²⁵²

In chapter two it has been established that because of the problems located at Member State level, there is a pressing need for an EPPO to enhance the protection of the financial interests of the EU. Chapter three in its turn demonstrates the desirability of an EPPO, as the mere strengthening of Eurojust does not suffice. In this chapter the practicalities of setting up an EPPO will be analysed. Firstly, the decision-making procedure to establish the EPPO will be explained, with a focus on the enhanced cooperation mechanism and the opt-in/-out status of certain Member States. Secondly, the organisational, substantive and procedural aspects of the EPPO will be examined. Thirdly, the future relationship of the EPPO with Eurojust, Europol and OLAF will be treated and the opinions of these EU bodies will be set forward. Fourthly and lastly, there will be a discussion on whether the EPPO should have its own police and investigative bodies with powers to conduct investigations on the territory of participating Member States or whether it would be dependable on the national law enforcement authorities and/or Europol/OLAF.

I. Decision-making procedure

1. Article 86 (1) para 1 TFEU: special legislative procedure

The wording in Article 86 TFEU, “... the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish an EPPO from Eurojust”, makes it clear that the establishment of an EPPO will not happen according the standard legislative procedure. In the ordinary procedure according to Article 289 (1) TFEU, the European Commission sends a proposal

²⁵¹ Michèle Coninx is the president of Eurojust and national member for Belgium.

²⁵² Eurojust News, issue 8, May 2013, p. 20, <http://eurojust.europa.eu/>, accessed 16 April 2014.

simultaneously to the European Parliament and the Council of the European Union who jointly adopt the regulation. In Article 289 (2) TFEU the special legislative procedure is set out: *“In the specific cases provided for by the Treaties, the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament, shall constitute a special legislative procedure”*. This means that the legislative act is not adopted by the tandem work of both the European Parliament and the Council of the European Union but by the work of one institution with the consent of the other. Thus the inter-institutional negotiations are eliminated and the institution whose consent is needed is in a ‘take it or leave it-position’: it will be presented with a draft that it has to accept or reject, without a possibility to further amending it.²⁵³ With regard to Article 86 TFEU this translates to the fact that the Council of the European Union decides on the regulation proposed by the European Commission and the European Parliament is no longer able to directly influence the draft. There is no regulation yet but the following pages will reflect on the recent developments and meetings in the Council of the European Union and the European Parliament.

1.1. Council of the European Union

The European Commission launched its proposal on 17 July 2013 and now it is up to the Council of the European Union to unanimously adopt a regulation on the EPPO. There have been several meetings on the EPPO in the Council of the European Union. The first important conference was held in Vilnius on 16-17 September 2013.²⁵⁴ More than 130 experts, including representatives from the Member States and European institutions, practitioners and academics, took part in the conference. The objective was to reflect on the framework of the EPPO and discussions focused on the three main aspects of the proposal: the institutional setting, the procedural regime and the material scope of competence of the future EPPO. The conference was quite optimistic about the proposal but concluded that there is a lot of work ahead to develop ideas and to clarify new questions raised. In order to achieve the required unanimity on the proposal, sufficient time should be devoted to deliberate upon all its aspects. Also, the discussions showed that the EPPO should be operable in the vast majority of Member States or at least as many as possible.²⁵⁵

²⁵³ European Parliament (Directorate-General for internal policies), “The future of Eurojust”, 2012, p. 127, <http://www.europarl.europa.eu/committees/en/studies.html>, accessed 8 March 2014.

²⁵⁴ Council of the European Union, “European Public Prosecutor’s Office: A Constructive Approach towards the Legal Framework”, Conference, Vilnius, 16-17 September 2013.

²⁵⁵ Council of the European Union, “European Public Prosecutor’s Office: A Constructive Approach towards the Legal Framework – Conclusions of the conference organized by the Lithuanian Presidency in cooperation with

The Council's Working Party on Cooperation in Criminal Matters²⁵⁶ discussed the proposal at several meetings since October 2013, when a detailed discussion was carried out on the following important themes: the structure and organisation of the EPPO, the competences of the EPPO, investigation measures and admissibility of evidence in national courts, judicial review of decisions taken by the EPPO, procedural safeguards, cooperation with national authorities, with EU institutions, agencies and bodies and with third countries and international organisations, and lastly the appropriate level of decision-making within the EPPO as regards investigations measures and prosecution.²⁵⁷

The proposal has also been discussed in the Council's Committee on Article Thirty Six²⁵⁸ on 25 February 2014, with a particular focus on certain issues regarding the appropriate level of decision-making within the EPPO. Delegations supported the idea of a clear delineation of powers of decision between the central office of the EPPO and the delegated prosecutors based in the Member States. The CATS has been instructed to continue to examine these issues, with a view to reaching a consensus as large as possible.²⁵⁹

Following these discussions in COPEN and CATS, the presidency of the Council of the European Union will continue with an examination of the financial provisions, the staff provisions and the rules on data protection and on transfer of personal data.²⁶⁰

the European Commission and the Academy of European Law", 13863/13, Brussels, 20 September 2013, p. 40, <http://db.eurocrim.org/>, accessed 24 April 2014.

²⁵⁶ Hereafter: COPEN.

²⁵⁷ Council of the European Union, "European Public Prosecutor's Office (EPPO)", 6419/14, Brussels, 12 February 2014, p. 1-2, <http://db.eurocrim.org/>, accessed 20 March 2014.

²⁵⁸ Hereafter: CATS.

²⁵⁹ Council of the European Union, "*Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office - Report on the State of play and questions to Ministers*", 6490/1/14, Brussels, 27 February 2014, p. 2, <http://register.consilium.europa.eu/>, accessed 19 March 2014.

²⁶⁰ Council of the European Union, "Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office - Discussion paper", 7150/14, Brussels, 3 March 2014, p. 1, <http://db.eurocrim.org/>, accessed 20 March 2014.

1.2. European Parliament

Commissioners Reding and Semeta are very optimistic about the European Parliament's view on the proposal. According to Reding, the European Parliament already voted with overwhelming support, calling for the establishment of the EPPO.²⁶¹ And also SEMETA²⁶² believes that the EPPO idea is taking root: *"The European Parliament is backing it and support in Member States is gaining ground. This will add an extra drive to this project and contribute to the quick advance of the discussions in the Council"*.²⁶³

Indeed, the proposal has already made progress in February 2014, when the European Parliament's Legal Affairs Committee showed its full support for the proposal with 19 votes for, 4 against and 0 abstentions.²⁶⁴ A few days later the proposal also received a positive vote in the European Parliament's Budgetary Control Committee with 21 votes for, 4 against and 1 abstention.²⁶⁵ On 19 February 2014 France and Germany, as two of the biggest and leading Member States of the EU, expressed their support for a swift agreement on the EPPO. Following this, the European Parliament's Committee on Civil Liberties, Justice and Home Affairs²⁶⁶ has backed the proposal on 20 February 2014 with 34 votes for, 7 against and 1 abstention.²⁶⁷ The LIBE committee confirms that the following elements of the proposal are essential: the decentralised structure of the EPPO, ensuring its integration in national judicial systems and union-wide strong procedural rights for suspects.

The LIBE Committee report passed to the European Parliament's plenary session and on 12 March 2014 the European Parliament has confirmed its support to the EPPO proposal with 487 votes for,

²⁶¹ V. REDING, "Establishing a European Public Prosecutor's Office – A federal budget needs federal protection", Speech 13/644, Press Conference, Brussels, 17 July 2013, http://europa.eu/rapid/press-release_SPEECH-13-644_en.htm, accessed 9 March 2014.

²⁶² Algirdas Semeta is the anti-fraud European Commissioner.

²⁶³ European Commission, "European Public Prosecutor's Office: European Commission proposal gains momentum", memo/14/124, Brussels, 20 February 2014, <http://europa.eu/rapid/press-release>, accessed 11 March 2014.

²⁶⁴ European Commission, "European Parliament committee backs European Commission proposal for a European Public Prosecutor's Office", memo/14/102, Brussels, 11 February 2014, <http://europa.eu/rapid/press-release>, accessed 11 March 2014.

²⁶⁵ E. ETERIS, "Additional control over EU funding", Copenhagen, 3 March 2014, <http://www.baltic-course.com/>, accessed 11 March 2014.

²⁶⁶ Hereafter: LIBE Committee.

²⁶⁷ European Commission, "European Public Prosecutor's Office: European Commission proposal gains momentum", memo/14/124, Brussels, 20 February 2014, <http://europa.eu/rapid/press-release>, accessed 11 March 2014.

161 against and 30 abstentions.²⁶⁸ REDING and SEMETA expressed their satisfaction by stating that “today’s vote by the European Parliament is good news for Europe’s taxpayers and bad news for criminals”. Now the proposal will pass to the ministers from the Member States in the Council of the European Union, who will have to take the European Parliament’s recommendations into account during the negotiations.

2. Article 86 (1) para 3 TFEU: enhanced cooperation

In the ideal situation the Council of the European Union would adopt the regulation on the EPPO with full unanimity, so that the EPPO would truly constitute a federal European body and ensure consistency in all the Member States. This is set out in Article 86 (1) paragraph 1 TFEU: “*The Council shall act unanimously after obtaining the consent of the European Parliament*”. However, as the TFEU itself seems to consider it realistic that not all Member States are willing to take this giant leap forward, in Article 86 (1) paragraph 2 TFEU there is a provision that in the absence of unanimity amongst the Member States, the proposal could be sent to the European Council for a political compromise.²⁶⁹

Paragraph three of Article 86 TFEU states that if after the deliberation of the European Council there is still disagreement, nine Member States may proceed with the proposal in the form of enhanced cooperation within four months after the suspension of the case. The general rules of this enhanced cooperation are laid down in Article 329 (1) TFEU: “*Member States which wish to establish enhanced cooperation between themselves in one of the areas covered by the Treaties shall address a request to the Commission, specifying the scope and objectives of the enhanced cooperation proposed. The Commission may submit a proposal to the Council to that effect. In the event of the Commission not submitting a proposal, it shall inform the Member States concerned of the reasons for not doing so*”.

Not much foresight is needed to observe that since the establishment of the EPPO requires unanimity and there are Member States which are clearly opposed to the idea (Cyprus, the Czech Republic, Denmark, Hungary, Ireland, Malta, the Netherlands, Romania, Slovenia and the UK)²⁷⁰, any regulation on the EPPO will eventually take the route of an enhanced form of cooperation. In such a

²⁶⁸ European Commission, “European Public Prosecutor’s Office: European Parliament confirms its support”, memo/14/183, Strasbourg, 12 March 2014, <http://europa.eu/rapid/press-release>, accessed 12 April 2014.

²⁶⁹ V. FRANSEN, “Proposed regulation on the European Public Prosecutor – Thinking federal?”, 8 August 2013, <http://europeanlawblog.eu>, accessed 9 March 2014.

²⁷⁰ X, “Malta opts out of European Public Prosecutor’s Office initiative”, 3 November 2013, <http://www.independent.com.mt/>, accessed 25 April 2014.

case the authorisation to proceed with enhanced cooperation shall be deemed to be granted without the need for a formal act of the Council of the European Union.²⁷¹

Whatever the outcome will be, the EPPO will most probably not cover the entire EU territory. This has made some authors question whether the EPPO would be the real federal prosecution office it always proclaimed to be. This is a correct question because although the EPPO has been put forward as a solution against the forum shopping of EU fraudsters, it is ironic that the EPPO will transform the non-participating Member States into new safe havens for criminals who wish to commit offences against the EU's financial interests.

3. Member States with a special status

The provisions in the TFEU on international cooperation in criminal matters do not apply to all Member States in the same extent. Three Member States in specific, Ireland, the United Kingdom and Denmark, chose not to be bound by future legislative measures with regard to the area of freedom, security and justice. Ireland and the UK have obtained the status of 'opting-in'-countries. This means that they have negotiated procedures to opt in the cooperation on a case-by-case basis. Denmark went even further and decided to 'opt-out' in the adoption of any legislative measures adopted under title V of the TFEU.²⁷²

3.1. Ireland and the UK

Protocol 21 TFEU²⁷³ holds specific provisions on Ireland and the UK regarding the application of certain articles of the TFEU. Article 1 sets out the principle: *"Subject to Article 3, the United Kingdom and Ireland shall not take part in the adoption by the Council of proposed measures pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union"*. Article 2 describes the consequences of this provision, being that measures adopted under this title are not binding for Ireland and the UK, will in no way affect their rights and competences, and will not be considered part of the EU acquis. The opt-in possibility is set out in Article 3: *"The United Kingdom or Ireland may notify the President of the Council in writing, within three months after a proposal or initiative has*

²⁷¹ European Commission, Communication from the European Commission to the European Parliament, the Council and the National European 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, Brussels, 27 November 2013, p. 2, <http://ec.europa.eu/>, accessed 8 March 2014.

²⁷² H. SATZGER, "Study on police and justice cooperation in the European Union", Munich, 28 November 2013, p. 16-17, <http://www.janalbrecht.eu/>, accessed 11 March 2014.

²⁷³ Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, *Official Journal of the European Union*, C 115, 9 May 2008.

been presented to the Council pursuant to Title V of Part Three of the TFEU, that it wishes to take part in the adoption and application of any such proposed measure, whereupon that State shall be entitled to do so”.

With respect to Ireland, there is a specific provision in this protocol in Article 8: *“Ireland may notify the Council in writing that it no longer wishes to be covered by the terms of this Protocol. In that case, the normal treaty provisions will apply to Ireland”*. The UK did not negotiate such a provision but can also become fully bound by title V by simply joining in all previous and future legislative measures.

Ireland and the UK had until 20 November 2013 to express their wish to take part in the adoption of this regulation. The UK confirmed already in the Coalition Agreement of 2010²⁷⁴ that it will not participate in the proposal for an EPPO in order to preserve the integrity of Britain’s criminal justice system.²⁷⁵ Right before the European Commission’s proposal on the EPPO on 14 July 2013, MAY²⁷⁶ confirmed the UK’s position: *“We are completely and utterly opposed to the establishment of a European Public Prosecutor or anything that heads in that direction. We will make sure that Britain does not participate and will not come under the jurisdiction of any such prosecutor”*.²⁷⁷

Also Ireland decided not to opt in. This means that they do not have a vote on that proposal in the Council of the European Union and that the required unanimity amongst Member State governments does not have to include their representatives. However, as it is also possible for Ireland and the UK to opt in post-adoption, they will probably conduct a thorough review of the final agreed text to perform active consideration of opting in to it.

3.2. Denmark

Under Protocol 22 TFEU²⁷⁸, Denmark does not take part in the adoption of the proposed regulation. Because of this opt-out status, it is not bound by title V of the TFEU at all, except when Denmark invokes Article 7 and 8 of the protocol, declaring the intention to be either bound by the same

²⁷⁴ X, “The Coalition: our programme for government”, London, 20 May 2010, p. 19, www.gov.uk/government, accessed 12 March 2014.

²⁷⁵ UK House of Commons – European Scrutiny Committee, “European Public Prosecutor’s Office: Reasoned Opinion, Reform of Eurojust, European Anti-Fraud Office”, fifteenth report of session 2013-14, published 17 September 2013, p. 5, <http://www.publications.European Parliament.uk/>, accessed 12 March 2013.

²⁷⁶ Theresa May is a British conservative politician and the current home secretary of the UK.

²⁷⁷ T. VOGEL, “Proposal for EU public prosecutor is designed to appease member states – More rights for persons under investigation”, 18 July 2013, <http://www.europeanvoice.com/>, accessed 12 March 2014.

²⁷⁸ Protocol (No 22) on the position of Denmark in respect of the area of freedom, security and justice, *Official Journal of the European Union*, C 115, 9 May 2008.

special procedure that already applies to the UK and Ireland or not to avail itself of these specific provisions. Indeed, in the EPPO proposal is explicitly stated that “*Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application*”.²⁷⁹

II. How the EPPO would function in practice

1. Organisation and structure

1.1. Different models

The vague wording in Article 86 TFEU that an EPPO can be established “*from Eurojust*” caused a large range of possible organisational models for the EPPO. These models for establishing the EPPO were the subject of a comparative study by the European Commission in its Staff Working Document of 2013.²⁸⁰ Next an overview will be given of the main possible models for the organisation of the EPPO: the establishment of the EPPO within Eurojust or the EPPO as a separate entity, and the advantages and disadvantages those models entail.

1.1.1. The EPPO within Eurojust²⁸¹

1) Eurojust becoming the EPPO

According to this model, Eurojust would gradually become the EPPO by a progressive increase in the powers of the college and the national members. One could think of some advantages this model would bring along, like the fact that this would be cost-saving because it would abrogate the need to create an entirely new organisation for the EPPO. Eurojust would act as the EPPO in accordance to EU fraud but for the other crimes continue with its horizontal role. This model also entails disadvantages, including the structural difficulties a Eurojust-EPPO would create. Indeed, the question arises as to how Eurojust, which is based on horizontal cooperation, will execute the role of a supranational EPPO.

²⁷⁹ European Commission, Proposal for a Council Regulation on the establishment of a European Public Prosecutor, COM (2013) 534 final, Brussels, 17 July 2013, p. 15, <http://eur-lex.europa.eu/>, accessed 14 March 2014.

²⁸⁰ European Commission, 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, Brussels, 17 July 2013, p. 32, <http://ec.europa.eu/>, accessed 15 March 2014.

²⁸¹ Report Strategic Seminar, “Eurojust and the Lisbon Treaty: Towards more effective action”, Bruges, 20-22 September 2010, *New Journal of European Criminal Law*, vol. 2, issue 1, 2011, p. 114.

As stated above, the sole strengthening of Eurojust to become the EPPO is not sufficient.²⁸² The EPPO should be established as an entity next to Eurojust. According to KLIP, developing Eurojust into an EPPO is not the correct way to proceed. He claims that reinforcing Eurojust will always be a quantitative effort but it will remain within the limits of Article 85 TFEU. The required leap to create an EPPO is not quantitative but qualitative in nature and it requires different tools and a completely different mind-set than that of strengthening Eurojust.²⁸³

2) The EPPO within the structure of Eurojust

Another option for the establishment of the EPPO was to create it as a specialised entity within the structure of Eurojust. The EPPO would be located next to Eurojust, being able to use its facilities, infrastructure and networks but would still operate independently from it. Evidently the advantage is that this is a cost-saving solution. But as opposed to model 1, the horizontal and vertical functions of Eurojust and the EPPO would not be mixed, which is essential for Eurojust's horizontal structure. The downside of this model might be that the smaller EPPO, as the supranational body, might eventually grow more powerful than Eurojust and overshadow it.

3) Eurojust and EPPO merge

This model seems similar to the first model. Indeed, again Eurojust and the EPPO would grow to form one body. But the difference with model 1 would be that although the two bodies would be united, Eurojust and the EPPO would still work with different decision-making structures. The advantages thinkable for this model are similar to the advantages of the first model. But this model entails a great disadvantage because the double decision-making structure makes a transformation of Eurojust's internal reorganisation inevitable. Sooner or later this would bring an end to the Eurojust as it currently stands, making it necessary for a new body to be formed. This would not be an ideal solution as it has been established that Eurojust is a well-functioning body that satisfies the Member States and it is indispensable that Eurojust continues to exist for other types of crime than the offences against the financial interests of the EU.

1.1.2. The EPPO as a separate entity

The fourth model would set the EPPO up as a separate entity, next to Eurojust and outside its structure but benefiting from its expertise. The two bodies would be kept entirely separate and this would be very advantageous for the internal structure. Another advantage is that, unlike a Eurojust-EPPO, the tasks of both entities would not overlap and they would both have clearly delineated competences. However this also entails a clear disadvantage: the fact that the cooperation between

²⁸² For more information on this, see *supra*, Chapter three: The desirability of the EPPO.

²⁸³ A. KLIP, *Substantive criminal law of the European Union*, Antwerpen, Maklu, 2011, p. 38.

these two bodies might be obstructed by a sense of competition, which would endanger the efficient information flow between Eurojust and the EPPO. It is safe to say that the EPPO will be established as an entity separate from Eurojust. Not only is this the view of the European Commission and the Member States, also a large number of academics have expressed their support for an independent EPPO. Amongst those academics is MONAR²⁸⁴, who opines that *“the EPPO must be created with its own distinct mandate and its own distinct competences, which means that it will be a separate organisation”*. Also NILSSON, one of the ‘founding fathers’ of Eurojust, stated explicitly that *“there is not one doubt in my mind that the EPPO must become a completely independent office”*.²⁸⁵

Within this model, three different options can be identified: a college-type EPPO, a centralised EPPO and a decentralised EPPO. More details on the decentralised EPPO will be set out below in part 1.2.

1) Collegial EPPO

The EPPO in the form of a college would consist of national members appointed by the Member States, similar to Eurojust or even with the same national members. This college model would be very closely linked to the national judicial systems through its national members, which is good because the investigations and prosecutions would be close to the actual fieldwork. On the other hand, as opposed to Eurojust, the national members would necessarily have a strong mandate and binding powers to exclusively direct the national investigations of crimes against the EU’s financial interests.

2) Centralised EPPO

A centralised EPPO would no longer be dependent on the national services, as it would be fully capable to legally and practically conduct investigations and prosecutions of crimes against the financial interests of the EU. The prosecutors and staff would be located at central level, falling completely under the capacity of the central entity, and would be able to act directly throughout the entire EU.

3) Decentralised EPPO

In the decentralised model there would be a prosecutor’s office at central EU level with a chief prosecutor supervising the delegated prosecutors located in the Member States. The EPP would have hierarchical powers over the ‘two-hatted’ delegated prosecutors, who have full prosecutorial authority under their national laws but are also a genuine part of the EPPO. The investigations and

²⁸⁴ Professor Doctor Jörg Monar is the director of European political and administrative studies at the College of Europe in Bruges.

²⁸⁵ Eurojust News, issue 8, May 2013, p. 12-14, <http://eurojust.europa.eu/>, accessed 17 April 2014.

prosecutions would still be led at decentralised level in the Member States but the EPPO would be capable of opening investigations and bringing cases to court.

1.2. European Commission: decentralised EPPO

1.2.1. Comparative assessment of the models

The European Commission made a clear choice in favour of the decentralised EPPO model and “opted for a solution that is respectful of the justice systems and legal traditions of the Member States without compromising on the aim to better protect the Union’s financial interests”.²⁸⁶ The decentralised EPPO turned out to be the best option in the comparative assessment of the European Commission in its Staff Working Document of 2013. This comparative assessment is set out in table 5.

²⁸⁶ V. REDING and A. SEMETA, Guest editorial, *eu crim*, 2013/4, p. 109.

Table 5: Comparative assessment of 4 different models (EPPO ‘within Eurojust’ merged into model 1)²⁸⁷

Objectives/ costs	Model 1: Within Eurojust	Model 2: College- type	Model 3: De- Centralized	Model 4: Centralized
Meeting the policy objectives	Medium	Low to Medium	High	High
Annual net benefit	€50 million	€50 million	€315 million	€250 million
Cost effectiveness	Medium	Medium	High	Medium
Impact on fundamental rights	Low	Medium to High	Medium to high	Medium to High
Feasibility	Medium	Medium	Medium to High	Medium
Impact on existing Union institutions	Medium to High	Medium to High	Medium to high	High
Impact on legal systems of Member States	Medium	Medium	Medium	High

Overall, taking into account the policy objectives, the annual net benefit, the cost effectiveness, the impact on fundamental rights, the feasibility, the impact on EU institutions and the impact on national legal systems, the decentralised system is deemed most profitable by the European Commission and the stakeholders²⁸⁸.

It is a more adequate model than model 1 and 2 because according to the impact assessment, these two models would deliver no more than incremental improvements to the current situation, while the creation of a decentralised EPPO would represent a significant change due to the guaranteed independence of the EPPO. Indeed, the comparative analyses showed that the only effective solution is to create an independent EPPO with clear powers, competence and responsibility, who will not be

²⁸⁷ European Commission, 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, Brussels, 17 July 2013, p. 54-55, <http://ec.europa.eu/>, accessed 24 March 2014.

²⁸⁸ The most affected stakeholders are the law enforcement and prosecutorial authorities in the Member States.

influenced by national interests and would create a harmonised European prosecution policy.²⁸⁹ Also, this model implies important advantages in terms of efficiency, like the fact that the EPPO would operate on a fast decision-making process and have a clear division of responsibilities. A decentralised EPPO would ensure the successful prosecution of a great number of cases – twice as many as currently – and this would mean an increase in recovery of EU money and higher deterrence for these crimes.²⁹⁰ Compared to the centralised model it is also a more efficient solution, as the centralised EPPO could encounter problems in working on the ground with national investigation and prosecution services because there are no delegated prosecutors who work under their national laws. The impact assessment shows that perhaps even 50 fewer cases might be prosecuted under this centralised structure than it would under the decentralised EPPO.²⁹¹

SEMETA supports the decentralised model for the EPPO in view of the fact that he thinks that *“this is the best of both worlds: Member States and the Union will be working seamlessly hand-in-hand against fraud, creating a fusion of powers and professionals from both sides which will be a mighty force for fraudsters to contend with”*.²⁹²

1.2.2. Features of a decentralised EPPO

The European Commission settled for a decentralised EPPO in Article 3 of its proposal: *“The EPPO is established as a body of the Union with a decentralised structure”*.²⁹³ This model is also referred to as the integrated EPPO model for two reasons. From a structural point of view the integrated EPPO would consist of a ‘head’ at the central level and ‘arms’ in the form of delegated prosecutors at Member State level, which would form a single body. From the viewpoint of available resources the integrated model would benefit from the existing resources both at national and EU level. It would

²⁸⁹ European Commission, 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, Brussels, 17 July 2013, p. 55, <http://ec.europa.eu/>, accessed 25 March 2014.

²⁹⁰ *Ibid*, p. 51.

²⁹¹ *Ibid*, p. 53.

²⁹² A. SEMETA, “Statement on European Public Prosecutor's Office”, Speech 13/645, Press Conference, Brussels, 17 July 2013, <http://europa.eu/rapid/press-release>, accessed 25 March 2014.

²⁹³ European Commission, Proposal for a Council Regulation on the establishment of a European Public Prosecutor, COM (2013) 534 final, Brussels, 17 July 2013, p. 17, <http://eur-lex.europa.eu/>, accessed 23 March 2014.

integrate the available resources of Eurojust and OLAF and would rely on national practitioners in the form of delegated prosecutors.²⁹⁴

This decentralised integrated model entails a hierarchical structure consisting of an EPP at central level along with deputies and other staff supporting it. Furthermore, there will also be one delegated prosecutor stationed in every Member State, who will wear a double hat. The fact that the EPPO will be anchored into the national systems will ensure consistency, coordination, speedy action, continued oversight of investigations and prosecutions, and proximity to the field work of investigations.

Cases will be treated at the most appropriate level, which in most cases will be in the Member States by the delegated prosecutors.²⁹⁵ However, this does not mean that the EPP will be excluded from those decisions. On the contrary, the EPP will be involved all along because of the obligation of national authorities and EU bodies to notify the EPP when a conduct might constitute an offence within its competence.²⁹⁶ Especially as to the decision whether to initiate a prosecution or not, the EPP has full decision-making powers.²⁹⁷ Also, where it is deemed necessary in the interest of the investigation or prosecution, the EPP may exercise his/her authority directly.²⁹⁸

Of ultimate importance is the fact that the decentralised EPPO would be an independent and accountable body. REDING and SEMETA underlined this: *“Independence, accountability, and decentralisation are the keywords in the proposal for a regulation on the EPPO”*.²⁹⁹ The EPPO cannot in any way be influenced by national interests when it comes to taking investigative or prosecutorial decisions.³⁰⁰ The EPP and the delegated prosecutors *“shall be chosen from persons whose independence is beyond doubt”*.³⁰¹ The delegated prosecutors shall act under the exclusive authority of the EPP and when they act within their EPPO mandate, they shall be fully independent from the

²⁹⁴ K. LIGETI and M. SIMONATO, “The European Public Prosecutor's Office: Towards a Truly European Prosecution Service?”, *New Journal of European Criminal Law*, vol. 4, issue 1-2, 2013, p. 15.

²⁹⁵ Art. 6 (4) proposed EPPO regulation.

²⁹⁶ Art. 15 (1) proposed EPPO regulation.

²⁹⁷ Art. 16 (1) proposed EPPO regulation.

²⁹⁸ Art. 6 (4) proposed EPPO regulation.

²⁹⁹ V. REDING and A. SEMETA, Guest editorial, *eu crim*, 2013/4, p. 109.

³⁰⁰ Art. 5 (2) proposed EPPO regulation.

³⁰¹ Art. 8 (2) and 10 (2) proposed EPPO regulation.

national prosecution bodies.³⁰² The well-functioning of the EPPO is ensured by its accountability to the European Parliament, the Council of the European Union and the European Commission for its general activities, in particular by giving an annual report.³⁰³

1.3. Member States: collegial EPPO

The proposal foresees a decentralised EPPO. However, in the JHA meeting of the Council of the European Union on 3 and 4 March 2014³⁰⁴, it became clear that the Member States do not back the European Commission's view. Ministers from all the Member States expressed their views on the structure of the EPPO, on the delimitation of its tasks and competences and on the regime of procedural rights. Only 7 Member States³⁰⁵ support the proposal to establish an integrated decentralised prosecution office. The majority of the Member States considers that the EPPO must be organised in the form of a college representing the participating Member States. The debate further focused on how an EPPO can be organised as a college while still ensuring that it can work efficiently and independently.³⁰⁶

2. Competence

2.1. Material scope

2.1.1. Unclear mandate

Article 86 (2) TFEU provides a legal basis for the competence of the EPPO: *"The EPPO shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests"*. However, the provision in Article 86 (4) TFEU gives the Council of the European Union permission to amend paragraphs 1 and 2 of this article and *"to include in the powers of the EPPO serious crime having a cross-border dimension"*. So that is why currently, as there has not yet been adopted a regulation, the crimes which fall under the EPPO's competence are still not known. It cannot be stated with certainty as to what type of mandate the EPPO will have: competence limited to the

³⁰² Art. 6 (5) proposed EPPO regulation.

³⁰³ Art. 5 (3) proposed EPPO regulation.

³⁰⁴ Council of the European Union, press release of the JHA meeting, 7095/14, Brussels, 3 and 4 March 2014, <http://www.consilium.europa.eu/>, accessed 26 March 2014.

³⁰⁵ Austria, Belgium, Bulgaria, Czech Republic, Luxembourg, Romania and Slovakia.

³⁰⁶ Council of the European Union, press release of the JHA meeting, 7095/14, Brussels, 3 and 4 March 2014, p. 16, <http://www.consilium.europa.eu/>, accessed 26 March 2014.

financial offences or maybe competence for the 32 offences for which there is mutual recognition³⁰⁷. There are several arguments as to why it is safe to assume that the EPPO will only be competent for crimes against the financial interests of the EU. This is the so called minimalistic approach. First of all this is what the European Commission envisages and secondly the Member States are in favour of this approach.

2.1.2. European Commission's view

In Articles 12 and 13 of its proposal the European Commission sets out the limited competence of the EPPO. In Article 12 of the proposed EPPO regulation, there is stated that *“the EPPO shall have competence in respect of the criminal offences affecting the financial interests of the Union, as provided for by Directive 2013/xx/EU and implemented by national law”*.³⁰⁸ The Directive on the fight against fraud to the Union's financial interests³⁰⁹, referred to in the proposal as ‘Directive 2013/XX/EU’, provides in Articles 3, 4 and 5 a definition of each offence against the financial interests of the EU: fraud affecting the Union's financial interests, fraud-related criminal offences³¹⁰, incitement, aiding, abetting, and attempt. The fact that the European Commission refers for the definition of the offences to a directive means that the EPPO will base its competence on national definitions as implemented by the respective Member States. The EPPO will thus have to deal with many different definitions, possibly leading to legal uncertainty for citizens and a risk of unequal treatment. The question arises as to why the EPPO proposal did not provide a directly applicable

³⁰⁷ Council of the European Union, Framework Decision on the European arrest warrant and the surrender procedures between Member States, 2002/584/JHA, 13 June 2002, *Official Journal of the European Communities*, L 190, 18 July 2002, Art. 2 (2): Participation in a criminal organisation, terrorism, trafficking in human beings, sexual exploitation of children and child pornography, illicit trafficking in narcotic drugs and psychotropic substances, illicit trafficking in weapons, munitions and explosives, corruption, fraud, laundering of the proceeds of crime, counterfeiting currency, including of the euro, computer-related crime, environmental crime, facilitation of unauthorised entry and residence, murder, grievous bodily injury, illicit trade in human organs and tissue, kidnapping, illegal restraint and hostage-taking, racism and xenophobia, organised or armed robbery, illicit trafficking in cultural goods, swindling, racketeering and extortion, counterfeiting and piracy of products, forgery of administrative documents and trafficking therein, forgery of means of payment, illicit trafficking in hormonal substances and other growth promoters, illicit trafficking in nuclear or radioactive materials, trafficking in stolen vehicles, rape, arson, crimes within the jurisdiction of the International Criminal Court, unlawful seizure of aircraft/ships, sabotage. Hereafter: MR-offences.

³⁰⁸ European Commission, Proposal for a Council Regulation on the establishment of a European Public Prosecutor, COM (2013) 534 final, Brussels, 17 July 2013, p. 21, <http://eur-lex.europa.eu/>, accessed 26 March 2014.

³⁰⁹ European Commission, Proposal for a Directive of the European Parliament and of the Council on the fight against fraud on the Union's financial interests by means of criminal law, COM (2012) 363 final, Brussels, 11 July 2012, <http://eur-lex.europa.eu/>, accessed 26 March 2014.

³¹⁰ *Ibid*, Art. 4: the provision of information or failure to provide information, money laundering, promising or accepting undue advantages on the part of European officials.

definition of the prohibited conduct. The Meijers Committee is convinced that the EPPO will have to come up with its own definition if it ever wants to be operational, *“because it will have to take decisions far before it becomes clear whether and if so in which Member State prosecution will take place”*.³¹¹

This limited mandate could be extended through Article 13 (1) of the proposed EPPO regulation, which provides the possibility to gift the EPPO with ancillary competence to prosecute crimes which although do not fall under Article 12, are so closely linked to the crimes under the latter article that it is in the interest of justice to prosecute such crimes together. But to ensure that the EPPO would not automatically extend its competence to other crimes than those defined in Directive 2013/XX/EU, there is an obliged consultation mechanism envisaged in Article 13 (2) of the proposed EPPO regulation, according to which the EPPO and the national prosecution authorities shall consult each other in order to determine which authority has competence. In fact, it is set out in Article 13 (3) that in case of disagreement over competence, the national judicial authority competent to decide on the attribution of competences concerning prosecution at national level shall decide on this ancillary competence. It is thus obvious that the European Commission did not think it was desirable for the EPPO to automatically extend its mandate beyond the offences against the EU’s financial interests, unless it would be in the interest of a good administration of justice.

Further, in its Communication on the EPPO of 2013 the European Commission emphasizes that *“focused competence on fraud against the Union’s financial interests is necessary for the EPPO”*.³¹² Again the European Commission only focuses on offences against the financial interests of the EU.

2.1.3. Member States’ view

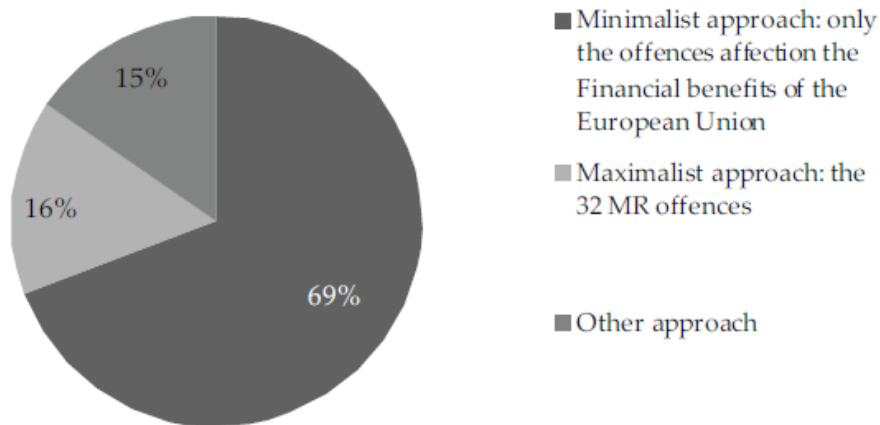
Diagram 2 below shows what studies of the IRCP³¹³ have concluded: a majority of 69% of the Member States prefers an EPPO only competent for offences against the financial interests of the EU.³¹⁴

³¹¹ Meijers Committee, “Note Meijers Committee on the proposed Council Regulation on the establishment of the European Public Prosecutor’s Office (COM (2013) 534 final)”, CM 1315, 25 September 2013, p. 2, <http://www.commissie-meijers.nl>, accessed 27 March 2014.

³¹² European Commission, Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee on the Regions – Better protection of the Union’s financial interests: Setting up the European Public Prosecutor’s Office and reforming Eurojust, COM (2013) 532 final, Brussels, 17 July 2013, p. 7, <http://ec.europa.eu/>, accessed 28 March 2014.

³¹³ Institute for International Research on Criminal Policy, University of Ghent.

Diagram 2: Member States' preference on the types of offences of the EPPO's competence



Indeed, in a seminar of 2010 where the experts, academics and practitioners involved had the chance to discuss Articles 85 and 86 TFEU, the participants agreed in general that the initial scope of competence of the EPPO should be restricted. The majority focussed on the fact that this would allow the development of an EPPO with a high degree of specialisation in the field of offences against the EU's financial interests. Also, they assumed that an EPPO with limited competence would ensure the participation of more Member States from the beginning, as it would only be competent then for offences which Member States consider to be of low priority. The more limited the EPPO's mandate would be, the more Member States would be willing to give up a part of their sovereignty in the prosecution. Competence of the EPPO for other offences could be envisaged only at a later stage of development.³¹⁵

In the recent JHA meeting of 2014³¹⁶ there was once again broad agreement on the necessary limited mandate of the EPPO. Member States viewed that the EPPO's basic mission would be jeopardized if it would be flooded with minor, less serious crimes which would better be dealt with at national level. This approach constitutes the most efficient solution, as it would also prevent increased costs

³¹⁴ G. VERMEULEN, W. DE BONDT and C. RYCKMAN, "Eurojust and its relevance in the debate on a future European Public Prosecutor's Office", in *Rethinking international cooperation in criminal matters in the EU*, Antwerpen, Maklu, 2012, p. 382.

³¹⁵ Report Strategic Seminar, "Eurojust and the Lisbon Treaty: Towards more effective action", Bruges, 20-22 September 2010, *New Journal of European Criminal Law*, vol. 2, issue 1, 2011, p. 116.

³¹⁶ Council of the European Union, press release of the JHA meeting, 7095/14, Brussels, 3 and 4 March 2014, <http://www.consilium.europa.eu/>, accessed 27 March 2014.

and make it possible for the EPPO to focus on investigations and prosecutions of more complex cross-border cases.³¹⁷

There are authors who argue that the fact that Member States think that it would be best if the EPPO would only be competent for financial offences, is merely because the EU budget is of low priority to them and that this does not reflect the need for an EPPO. According to them this means exactly the contrary. Precisely because of the low importance for the Member States, the EPPO seems politically acceptable for these offences but only for these offences.³¹⁸ This view is correct in the sense that it is indeed easier for Member States to give up a part of their sovereignty for crimes which they know are not prosecuted sufficiently at national level. But the fact that Member States assign these crimes with low priority does not naturally mean that these crimes actually are less important. In fact, the quantitative importance of the EU budget, the impact of the financial crisis and the accession of new Member States indicate the significance of offences affecting the financial interests of the EU.³¹⁹ The reflex of the Member States to put less attention in this crime area is quite natural: since there is no real ownership of the EU budget, Member States shift all the responsibility to each other. So it is incorrect to conclude that these crimes are therefore less important, on the contrary, it is precisely because Member States do not act on this themselves that the EPPO is such a valuable and needed institute.³²⁰

2.1.4. Conclusion

There seems to be a consensus amongst EU institutions and Member States about limiting the material scope of the EPPO to financial offences. Also Eurojust, Europol and OLAF all agree that it is more realistic for the EPPO to start with a limited scope of competence.³²¹ That is why the Committee on Budgetary Control of the European Parliament, which supports the minimalistic

³¹⁷ J. BERG, "EU Member States positions on EPPO: Enough for the EU to be a strong and committed crime-buster?", 12 March 2014, <http://www.transparencymonitoring.eu/>, accessed 16 March 2014.

³¹⁸ G. VERMEULEN, W. DE BONDT and C. RYCKMAN, "Eurojust and its relevance in the debate on a future European Public Prosecutor's Office", in *Rethinking international cooperation in criminal matters in the EU*, Antwerpen, Maklu, 2012, p. 383.

³¹⁹ Report Strategic Seminar, "Eurojust and the Lisbon Treaty: Towards more effective action", Bruges, 20-22 September 2010, *New Journal of European Criminal Law*, vol. 2, issue 1, 2011, p. 115.

³²⁰ This is linked to the subsidiarity principle: the EPPO should only step up in cases where Member States cannot or will not step up themselves.

³²¹ European Parliament (Directorate-General for internal policies), "Improving Coordination between the EU bodies Competent in the Area of Police and Judicial Cooperation: Moving towards a European Prosecutor", 18 January 2011, p. 32-40, <http://www.europarl.europa.eu/studies>, accessed 20 March 2014.

approach, suggested in its draft opinion on the EPPO proposal of January 2014 that “*the name of the body should be changed to ‘European Financial Public Prosecutor’s Office’*”.³²²

But there are still unanswered questions. For not only is it not yet official and still vague as to whether the EPPO’s mandate should be limited to the offences against the EU’s financial interests, it is also still unclear as to which crimes exactly would fall under these offences. So even if the minimalistic approach is taken up in the future regulation, the discussion on the substantial scope of the EPPO would still not be finished. The question would then arise as to whether the EPPO will have competence to prosecute just fraud offences or whether a group of core crimes affecting the finances of the Union will be liable for prosecution under the EPPO. However, should the EPPO’s competence go beyond crimes affecting the financial interests of the EU, there would be concurrent powers with Eurojust and complexity would only increase. This is also one of the reasons that there is consensus on the EPPO’s limited competence. However, there are some suspicious voices that proclaim that the whole ‘merely combating crimes against the EU’s financial interests’ is only the political selling idea for the EPPO and other competences would eventually come to it through a back door.³²³

Although there are many arguments that support this minimalistic approach, NEAGU has his doubts about the message the EU is sending out to its citizens with this approach: “*The message sent to the European citizens is the following one: several legal goods of tremendous importance to you are of secondary importance to us. More important are our financial interests and we chose a very powerful and revolutionary instrument to protect them*”. He deems that the only logical justification for this minimalistic approach is the lack of political will of Member States to grant more powers to EU institutions in the field of criminal law.³²⁴

³²² European Parliament (Committee on Budgetary Control), draft opinion for the Committee of Civil Liberties, Justice and Home Affairs on the proposal for a Council regulation on the establishment of a European Public Prosecutor’s Office, 2013/0255, 24 January 2014, p. 4, <http://www.europarl.europa.eu/>, accessed 29 March 2014.

³²³ M. ZWIERS, *The European Public Prosecutor’s Office. Analysis of a Multilevel Criminal Justice System*, Antwerpen, Intersentia, 2011, p. 391.

³²⁴ N. NEAGU, “The European public prosecutor’s office – Necessary instrument or political compromise?”, *Law Review*, vol. 3, issue 2, July-December 2013, p. 61.

2.2. Jurisdiction

2.2.1. Principle: Articles 14 and 16 proposed EPPO regulation

The EPPO has been provided with a clear and exclusive jurisdiction under Article 14 of the proposed EPPO regulation: it is exclusively competent if the crimes mentioned under Article 12 are committed either on the territory of the Member States³²⁵ or if the crime has been committed by a national of a Member State, by a Union staff member or by members of the EU institutions³²⁶. Where competence and jurisdiction seem to concur, the EPPO can start investigations. This is stated in Article 16 of the proposed EPPO regulation: *“The EPP or, on his/her behalf, the European Delegated Prosecutors shall initiate an investigation by written decision where there are reasonable grounds to believe that an offence within the competence of the EPPO is being or has been committed”*.

2.2.2. Critiques

The proposed jurisdiction of the EPPO is broadly defined and called exclusive. This has triggered some remarks of the Council of the European Union and the CCBE.

1) Council of the European Union

In recent negotiations in the Council of the European Union in February 2014 the majority supported the proposed rule of Article 14 but noted that there are still some points that need further clarification. They wondered what the effect of this rule would be on non-participating Member States, what the definition of the notion *“committed on the territory”* is and whether this notion covers the place of commission and/or the effects of the offence, and noticed that there would be issues related to a double criminality requirement in some national laws.³²⁷

2) CCBE

The CCBE³²⁸ raises questions about the immediate and exclusive jurisdiction that the EPPO would have over crimes affecting the EU's financial interests. According to the CCBE an exclusive competence is not desirable so they suggest limiting the prosecutions undertaken by the EPPO in the initial phase, as there will undoubtedly be a learning curve. Three possible models to limit

³²⁵ Article 14 (a) proposed EPPO regulation.

³²⁶ Article 14 (b) proposed EPPO regulation.

³²⁷ Council of the European Union, *“Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office - Report on the State of play and questions to Ministers”*, 6490/14, Brussels, 14 February 2014, p. 2, <http://db.eurocrim.org/>, accessed 27 March 2014.

³²⁸ The Council of Bars and Law Societies of Europe, which represents the bars and law societies of 32 Member States and 12 further associate and observer countries, and through them more than 1 million European lawyers.

prosecutions by the EPPO are proposed: firstly, the EPPO could be considered a 'prosecutor of last resort', who prosecutes only when Member States are unwilling or unable to prosecute. The second possibility is to introduce a minimum gravity test based on the value of the subject matter of the offence. Thirdly, obliging the EPPO to make in advance an active selection over cases considered appropriate for prosecution by itself and referring other cases back to the national prosecutors would be preferable over an automatic exclusive jurisdiction.³²⁹

Not only does the CCBE worry about the exclusivity of the EPPO's jurisdiction, also the fact that its jurisdiction would be so broad is a reason for concern. The CCBE points out that this broad jurisdiction means that the EPPO is not merely competent for complex, transnational cases but also for simple cases of a purely domestic nature. The CCBE fears that *"there is a serious danger that an EPPO would be swamped by the case load volume and that therefore a potentially worthy proposal would flounder on the practicalities of lack of resources"*.³³⁰

Also KLIP finds this exclusive broad competence of the EPPO unfortunate because the national law enforcement and prosecuting authorities have no longer the possibility to start investigations and prosecutions of an offence against the financial interests of the EU without being ordered by the EPPO. They will merely be the 'services' of the EPPO. KLIP raises the interesting question as to why the functions of the EPPO and the national authorities are not defined more complementary, in a way that the Member States would still be competent for the smaller local cases and the EPPO would be competent for the large transnational cases. Although Article 15 of the proposed EPPO regulation holds an obligation for the Member States to provide the EPPO with information, the fact that Member States will be deprived of the ability to prosecute these cases themselves will lead to a decrease of active investigations which will result in the fact that Member States will have less useful information to provide to the EPPO. And above all it is incomprehensible that the Member States will now be discouraged to take action against offences harmful to the EU's financial interests, when the European Commission created the concept of an EPPO because it blamed the Member States for not taking sufficient action to protect the EU's financial interests.³³¹

LIGETI and SIMONATO have a completely opposite view on this. According to them it is only natural that the EPPO would also be competent in purely national cases because *"the EPPO is meant to overcome*

³²⁹ CCBE, "CCBE response to a proposal for a European Public Prosecutor", 29 November 2013, p. 1-2, <http://www.ccbe.eu/>, accessed 26 March 2014.

³³⁰ *Ibid*, p. 2.

³³¹ A. KLIP, "Een Europees Openbaar Ministerie", Ed., DD, 2013, afl. 9, p. 657.

the ‘cooperation approach’ and its mandate cannot be limited to the coordination of different authorities investigating certain crimes”. The fact that the EPPO’s competence would reach this far would represent a major difference to the current situation in which the EU bodies have no means to intervene in investigations concerning only one Member State even in case of substantial harm to the EU interests or if EU officials are involved or if an equivalent approach throughout the entire EU is necessary.³³²

2.3.Tasks

The previous two parts 2.1 and 2.2 provided an answer to the question ‘when’ the EPPO is competent. This part will now provide an answer to the question ‘for what’ the EPPO is competent. The proposal grants a large amount of tasks to the EPPO, as stated in Article 4 (2): *“The EPPO shall be responsible for investigating, prosecuting and bringing to judgment the perpetrators of, and accomplices in the criminal offences referred to in paragraph 1...”*. Within its scope of competence the EPPO will thus exercise the same tasks as a national prosecutor, except for the supervision of the execution of sentences. In respect of these tasks the EPPO definitely resembles a federal prosecutor.³³³

2.3.1. Investigating

a. European single legal area

Although the tasks of the EPPO resemble those of a federal prosecutor, the proposed rules of the EPPO regulation will not create a true federal criminal procedure. As will be demonstrated in part 3 about the procedural aspect below, the applicable rules will mainly be the national rules. The EPPO proposal is strongly based on national criminal procedure and automatic mutual recognition, necessarily combined with a certain degree of approximation.³³⁴ One of the important approximation principles is that of the European territoriality, envisaged in Article 25 of the proposed EPPO regulation, which states that the EPPO may investigate in all the participating Member States because the territory of the Member States shall be considered as a single legal area. The EPPO will

³³² K. LIGETI and M. SIMONATO, “The European Public Prosecutor's Office: Towards a Truly European Prosecution Service?”, *New Journal of European Criminal Law*, vol. 4, issue 1-2, 2013, p. 11.

³³³ V. FRANSSSEN, “Proposed regulation on the European Public Prosecutor – Thinking federal?”, 8 August 2013, <http://europeanlawblog.eu>, accessed 27 March 2014.

³³⁴ *Ibid.*

exercise its tasks in this single legal area without having to use any of the existing cumbersome and time-consuming intergovernmental instruments of legal assistance.³³⁵

b. Stages of the investigation

In Article 16 (1) of the proposed EPPO regulation the initiation of an investigation by the EPPO is set out. The initiation needs to happen by written decision where there are reasonable grounds to believe that an offence within the competence of the EPPO is being or has been committed. Where the initiative was taken by a delegated prosecutor, he/she needs to inform the EPP of this and then the EPP checks whether no other delegated prosecutors started investigations on this case yet. Afterwards, the EPP decides whether that delegated prosecutor further investigates the case or to refer the case to another delegated prosecutor or to take over the case himself.

After the initiation phase the conducting of the investigation is described in Article 18 of the proposed EPPO regulation, which states that the EPP instructs the delegated prosecutors, who lead the investigations on his/her behalf.³³⁶ The competent law enforcement authorities in the Member State where he/she is located shall comply with the instructions of the delegated prosecutor and execute the investigation measures assigned to them. The investigation can also be undertaken by the EPP directly and then he/she shall inform the delegated prosecutor in the Member State where the investigation measures need to be carried out.³³⁷ Also, Article 18 (3) holds the possibility for the EPPO to associate several delegated prosecutors with the investigation and set up joint teams in cross-border cases. In Article 18 (5) another important provision on the investigation is set out: the EPP may reallocate the case to another delegated prosecutor or himself/herself lead the investigation if this appears necessary in the interest of the efficiency of the investigation or prosecution, or on the grounds of certain criteria³³⁸ set out in this article.

Article 26 (1) of the proposed EPPO regulation provides a large list of investigation measures that the EPPO can request or order during its investigations. Other measures may only be ordered or requested by the EPPO if available under the law of the Member State where the measure is to be

³³⁵ European Commission, "Every euro counts. Frequently Asked Questions on the European Public Prosecutor's Office", memo/13/693, Brussels, 17 July 2013, p. 3, <http://europa.eu/rapid/press-release>, accessed 27 March 2014.

³³⁶ Art. 18 (1) proposed EPPO regulation.

³³⁷ Art. 18 (6) proposed EPPO regulation.

³³⁸ a) the seriousness of the offence; b) specific circumstances related to the status of the alleged offender; c) specific circumstances related to the cross-border dimension of the investigation; d) the unavailability of national investigation authorities; or e) a request of the competent authorities of the relevant Member State.

carried out.³³⁹ If the conditions are met, the authorisation for the measure shall be given within 48 hours in the form of a written and reasoned decision by the competent judicial authority.³⁴⁰

c. Information

With regard to the EPPO's sources of information there are several relevant articles. It is first of all important to mention Article 15 of the proposed EPPO regulation, as this article explains how the EPPO gets notified of conduct that constitutes an offence within its competence. Firstly, it is the obligation of all national authorities, all institutions, bodies, offices and agencies of the Union, and all the delegated prosecutors to immediately inform the EPPO of such conduct.³⁴¹ Secondly, the EPPO may collect or receive information from any other person.³⁴²

Once notified, Articles 20 and 21 of the proposed EPPO regulation regulate the further access to information of the EU bodies or Member States by the EPPO. Article 20 states that the EPPO shall be able to obtain any relevant information stored in national databases or have access to such information through the delegated prosecutors. Article 21 holds the obligation for Eurojust and Europol to foresee the EPPO of information that is necessary for the purpose of its investigations.

The EPPO will also have its own information system set out in Article 22, called the Case Management System, which is composed of temporary work files and of an index which contains personal and non-personal data. The access to this system is strictly narrowed, as Article 24 states that the delegated prosecutors and their staff can only access the files in three occasions³⁴³.

d. Additional powers

As one can imagine in the sphere of fraud and corruption, it often happens that persons with privileges or immunities are involved in the case. To make sure that the investigation of the case is not completely blocked by this, there is foreseen in Article 19 of the proposed EPPO regulation that the EPPO shall make a reasoned written request for the lifting of privileges or immunities that

³³⁹ Art. 26 (2) proposed EPPO regulation.

³⁴⁰ Art. 26 (6) proposed EPPO regulation.

³⁴¹ Art. 15 (1 and 2) proposed EPPO regulation.

³⁴² Art. 15 (3) proposed EPPO regulation.

³⁴³ a) the index, unless such access has been expressly denied; b) temporary work files opened by the EPPO related to investigations or prosecutions taking place in their Member State; c) temporary work files opened by the EPPO related to investigations or prosecutions taking place in another Member State in as far as they relate to investigations or prosecutions taking place in their Member State.

present an obstacle to the investigation. The EPPO must act in accordance with the procedures laid down by national law or Union law, depending on the kind of privilege/immunity.

As the EPPO's competence will not always be crystal clear, the EPPO must also be competent to take urgent measures in cases where the investigation is hampered by this confusion. Article 17 of the proposed EPPO regulation states that *"pending a decision on competence, the EPPO shall take any urgent measures necessary to ensure effective investigation and prosecution of the case"*.

2.3.2. Prosecuting and bringing to judgement

The EPPO will have the same powers as the national prosecutors in respect of prosecution and bringing a case to judgement in the Member States. Article 27 (1) of the proposed EPPO regulation sets out some specific powers of the EPPO: *"Present trial pleas, participate in evidence taking and exercise the available remedies"*. When an investigation was carried out by a delegated prosecutor, it sends a summary of the case to the EPP for review. The EPP can decide three things: that the delegated prosecutor can bring the case for the national court, that the case needs to be referred back for further investigations, or that he/she will bring the case to the national court him/herself.³⁴⁴ After prosecution the EPPO has a choice: bringing the case to court with an indictment, dismiss the case or settling with a transaction.

a. Trial

When the EPP wants to send a case for trial to a national court, it determines in close consultation with the delegated prosecutor involved in the case what the competent national court will be on the basis of several criteria³⁴⁵ set out in Article 27 (4). From this moment on the applicable law will be that of the forum state.

b. Dismissal

According to Article 28 of the proposed EPPO regulation, the EPPO may decide to dismiss a case when the prosecution has become impossible³⁴⁶ or on certain other grounds³⁴⁷. The EPPO shall

³⁴⁴ Art. 27 (2) proposed EPPO regulation.

³⁴⁵ a) the place where the offence, or in case of several offences, the majority of the offences was committed; b) the place where the accused person has his/her habitual residence; c) the place where the evidence is located; d) the place where the direct victims have their habitual residence.

³⁴⁶ Art. 28 (1) proposed EPPO regulation: a) death of the suspected person; b) the conduct subject to investigation does not amount to a criminal offence; c) amnesty or immunity granted to the suspect; d) expiry of the national statutory limitation to prosecute; e) the suspected person has already been finally acquitted or convicted of the same facts within the Union or the case has been dealt with in accordance with Article 29.

inform the injured party of the dismissal if the investigation was initiated on the basis of information provided by him/her.³⁴⁸ Although dismissed, the EPPO can refer the case to OLAF or the competent national authorities for recovery, follow-up or monitoring.³⁴⁹

c. Transaction

If the EPPO decided not to dismiss the case but for the proper administration of justice also decided not to bring the case to a national court, the EPPO can propose to the suspected person to engage in a transaction, after all the damage has been compensated. This way the suspected pays a lump-sum³⁵⁰ fine in return for the final dismissal of the case.³⁵¹ The EPPO officially notifies the competent national authorities and the relevant Union institutions, bodies and agencies of this dismissal³⁵², which is not subject to judicial review³⁵³.

3. Procedural aspect

3.1. Applicable rules: hybrid system

The functioning of the EPPO will have to find a balance between approximation and international cooperation so its activities will be governed by both approximated EU rules and national rules of the Member States.³⁵⁴ The procedural system for the EPPO is thus a hybrid one. Article 86 (3) TFEU states that regulations shall determine the general rules applicable to the EPPO's activities, the conditions governing the performance of its functions, the rules of procedure, the admissibility of evidence and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions. However, Article 27 of the proposed EPPO regulation determines that the trial shall take place before the competent courts of the Member States. So there will be specific European

³⁴⁷ Art. 28 (2) proposed EPPO regulation: a) the offence is a minor offence according to national law implementing *Directive 2013/XX/EU on the fight against fraud to the Union's financial interests by means of criminal law*; b) lack of relevant evidence.

³⁴⁸ Art. 28 (4) proposed EPPO regulation.

³⁴⁹ Art. 28 (3) proposed EPPO regulation.

³⁵⁰ Lump sum: money in a single large payment instead of small separate payments.

³⁵¹ Art. 29 (1) proposed EPPO regulation.

³⁵² Art. 29 (3) proposed EPPO regulation.

³⁵³ Art. 29 (4) proposed EPPO regulation.

³⁵⁴ For more information on this, see *supra*, Chapter two: Need for an EPPO, Part II: Problems in the current prosecution, 2. Low prosecution level → impunity, 2.1. Trans-European cases of EU fraud, 2.1.3. Partial solution: Stepping-up approximation.

rules applicable to the pre-trial procedure whereas the national criminal procedural law of the forum state shall apply to the trial.

Article 11 (3) of the proposed EPPO regulation states that *“national law shall apply to the extent that a matter is not regulated by this Regulation. Where a matter is governed by national law and this Regulation, the latter shall prevail”*. This article makes it clear that the EPPO will mainly rely on national rules of investigation and prosecution because they apply if the regulation does not provide for more specific provisions. LIGETI and SIMONATO point out that *“the more the EPPO’s work is based on national criminal procedural laws, the greater the risk is that the EPPO will become a prisoner of national laws”*.³⁵⁵

3.1.1. Specific European rules

Unfortunately, the proposed EPPO regulation introduces only a few approximated European rules, where absolutely necessary to ensure the efficiency and effectiveness of the EPPO's activities and in order to ensure a high level of procedural safeguards for the suspected persons. The proposed EPPO regulation provides for European rules in three main areas: the investigative powers of the EPPO, the admissibility of evidence obtained by the EPPO and the procedural safeguards.

a. Conduct of investigations

There are specific provisions on the conduct of investigations by the EPPO in Article 18 of the proposed EPPO regulation and a list of investigation measures that can be ordered by the EPPO in Article 26. However, although the EPPO proposal sets out which investigative powers the EPPO will have, it does not regulate the details of it so that these rules need to be supplemented with the national rules of the Member State in which the investigation is carried out. For example Article 26 (2) of the proposed EPPO regulation clearly states that there can only be made use of other investigative measures than those in paragraph 1 if they are available under the law of the Member State where the measure is to be carried out. Another example can be found in paragraph 7 of Article 26, which holds the possibility for the EPPO to request the arrest or pre-trial detention of the suspected in accordance to the relevant national law. As a last example Article 26 (4) must be mentioned. This article encompasses an EU-wide requirement of a prior judicial authorisation for the EPPO’s most intrusive investigative measures. While there are specific European rules foreseen in the regulation about the form of the authorisation and the time-frame in which it must be delivered, the authorisation as such will be given by the national competent judicial authority in accordance with national law.

³⁵⁵ K. LIGETI and M. SIMONATO, “The European Public Prosecutor's Office: Towards a Truly European Prosecution Service?”, *New Journal of European Criminal Law*, vol. 4, issue 1-2, 2013, p. 19.

b. Admissibility of evidence

The proposed EPPO regulation contains rules on the admissibility of evidence. It sets out in Article 30 that evidence gathered lawfully by the EPPO in one Member State is admissible in the trial courts of all Member States without any validation even if the national law of the Member State where the court is located provides for different rules on the collection or presentation of that evidence. However, if the trial court would consider that the evidence affects the fairness of the procedure or the rights of defence as enshrined in the Charter of Fundamental Rights, the evidence would be inadmissible after all. This automatic admissibility of evidence seems an easy solution but raises some questions regarding the equality of arms principle. Article 32 (5) of the proposed EPPO regulation states that people involved “*shall have all the procedural rights available to them under the applicable national law*”, including procedures for admissibility of evidence. The fact that evidence gathered by the EPPO would be admissible without any prior validation or procedure makes these two provisions contradictory.³⁵⁶

Also, an automatic admissibility of evidence will cause a lot of practical problems because Member States will still have different rules on the gathering of evidence. Member States will only accept the fact that evidence gathered by the EPPO is admissible without any validation if it were to be accompanied by the introduction of some form of minimum common standards for gathering evidence.³⁵⁷ It has been stated above that approximation through minimum rules is necessary to create a single European criminal justice system and that the EPPO will be a catalyst for this by introducing certain specific European rules. However, this is not a one-way-street. Not only will the EPPO stimulate the approximation, it is also necessary to establish some form of approximation of evidence gathering rules to make this automatic admissibility of evidence gathered by the EPPO work in practice.

c. Procedural safeguards

There are specific European rules foreseen on the procedural safeguards in the Articles 32-35 of the proposed EPPO regulation, presenting minimum procedural rights “*as they are provided for in Union legislation and the national law of the Member State*”.³⁵⁸ In Article 32 (2) of the proposed EPPO

³⁵⁶ European Economic and Social Committee, “Preliminary draft opinion of the Section for Employment, Social Affairs and Citizenship on the Establishment of the European Public Prosecutor's Office”, SOC/491, Brussels, 15 October 2013, p. 3, www.economiesociale.net, accessed 27 April 2014.

³⁵⁷ Report Strategic Seminar, “Eurojust and the Lisbon Treaty: Towards more effective action”, Bruges, 20-22 September 2010, *New Journal of European Criminal Law*, vol. 2, issue 1, 2011, p. 117.

³⁵⁸ Article 32 (2) proposed EPPO regulation.

regulation there are certain procedural rights for which there is referred to specific European legislation, such as the right to interpretation and translation, the right to information and access to the case materials, and the right of access to a lawyer and the right to communicate with and have third persons informed in case of detention.³⁵⁹ However, there are also certain rights for which the national law is applicable, such as the right to remain silent and the right to be presumed innocent, the right to legal aid, and the right to present evidence, appoint experts and hear witnesses.³⁶⁰

3.1.2. National rules

Once the investigation stage is over and the EPPO decided in which national court the case will be brought forward to, the applicable law will be the law of the Member State where the case will be heard. The problem with this approach is that different laws will be applicable depending where the case is heard but irrespective of the crime committed. There are 28 Member States each with their own applicable laws, which could potentially result in having the same or similar crimes being treated differently throughout prosecution.

One might wonder what the added value of an EPPO is if the conviction rates will still be varying across the different Member States. The answer to that question is that the investigations and prosecutions will increase with a Union-wide prosecutor that lays the responsibility in the hands of the Member States. In its turn the rate of convictions will most probably increase together with the increase in investigations and prosecutions.³⁶¹ However, the varying extent and nature of convictions is an unsolvable issue due to the 30 different legal systems in the EU.

3.2. Judicial review

Article 86 TFEU does not create a specific European court handling cases that fall within the competence of the EPPO. On the contrary, the Treaty clearly specifies that charges concerning the EPPO shall be filed at the relevant Member State court. Article 36 (1) of the proposed EPPO regulation states that the measures of the EPPO performed during its functions may be submitted to judicial review by the competent national court in the same way as the investigative acts of national prosecutors. The rationale behind this is that the acts of investigation of the EPPO are closely related to an eventual prosecution and will mainly have effects in the legal orders of the Member States. It is therefore appropriate to consider the EPPO as a national public prosecutor for the purpose of the

³⁵⁹ Article 32 (2, a,b and c) proposed EPPO regulation.

³⁶⁰ Article 32 (2, d, e and f) proposed EPPO regulation.

³⁶¹ For more information on this, see *supra*, Chapter two: The need for an EPPO, part III: Core of the subsidiarity test, 2. EU added value, 2.2. The EPPO as a solution to the low prosecution level, picture 2: enforcement cycle.

judicial review. As a result, national courts should be entrusted with the judicial review and the Union courts should not be directly competent with regard to those acts since they should not be considered as acts of an office of the Union.³⁶²

It is thus clear that the European Commission did not intend to install a federal court system. This is contrary to what was suggested in the Draft Model Rules of 2012³⁶³ in rule 7: *“To the extent indicated in these Rules, decisions of the EPPO affecting individual rights are subject to review by the European court”*. In the current EPPO proposal the Court of Justice of the EU will have no jurisdiction in EPPO cases pursuant Articles 263, 265 and 268 TFEU. However, the proposal clearly states that Member States can refer questions for preliminary rulings to the Court of Justice on the interpretation or the validity of provisions of Union law which are relevant for the judicial review of acts of the EPPO under Article 267 TFEU. This preliminary rulings procedure ensures that the regulation is applied uniformly throughout the Union.

There are some parties with doubts about this purely national judicial review. According to the CCBE, the fact that the choice of venue is that of the EPPO alone without being subject to European review would create the perception amongst EU citizens that the outcome of the prosecution was affected by the decision on trial venue. This would bring forth the feeling that the EPPO is potentially biased and could engage in forum shopping to achieve its desired outcome. Therefore, there must be a meaningful judicial review by the courts of the EU as originally suggested in the Draft Model Rules of 2012. In fact a purely national review is potentially in breach of Article 263 TFEU³⁶⁴. This European judicial review would have several advantages. First of all, it would have the effect of facilitating approximation in providing consistent rulings about how the trial venue should be selected. Clear guidelines will function as precedents, creating greater predictability by national courts, gradually obviating the need for further review by the courts of the EU in the future. Secondly, the European

³⁶² European Commission, Proposal for a Council Regulation on the establishment of a European Public Prosecutor, COM (2013) 534 final, Brussels, 17 July 2013, p. 7, <http://eur-lex.europa.eu/>, accessed 28 March 2014.

³⁶³ K. LIGETI, “Model Rules for the Procedure of the EPPO”, <http://www.eppo-project.eu>, accessed 29 March 2014.

³⁶⁴ *“The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the European Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties”*.

courts will be able to develop greater expertise in dealing with these reviews regularly, as opposed to the national courts' expertise being developed little-by-little and in isolation.³⁶⁵

Also a proponent of a European review is KLIP, who considers that although it is logic that the EPPO's actions are not open for review by the European Court of Justice because that would make the court *de facto* a criminal judge, there are several negative effects to this purely national review. Firstly, if there would be disagreement between a Member State and the European Commission on what the EPPO is permitted to do according to the regulation, this would necessarily need to be settled by an independent European court and not by the court of the Member State. Secondly, since the EPPO is an EU body, it is bound by the European rules and should be called to account on it. A mere national review is insufficient for this because there will be actions of the EPPO that will not be judged by the national court if the case is dismissed before it ever gets there. It is not because a case does not reach the trial stage, that there are no procedural rights involved in the investigation stage, which will thus not be protected when there is solely a review by the national court. A European review is indispensable for the protection of fundamental procedural rights in the pre-trial stages.³⁶⁶

Also the Meijers Committee focussed in its note of 25 September 2013 on the importance of a review by the European Court of Justice. They note that it would be contradictory that the EU's own court would be side-lined when reviewing the compliance of the activities of the EU's own prosecutor with the Union's law, such as this regulation, the Charter of Fundamental Rights and other human rights obligations. The Committee is not convinced that Article 267 TFEU limits the court's competence for acts of the EPPO having implications beyond interpreting national law.³⁶⁷

As a last remark with regard to review of the EPPO, the proposition of Spain and France in the Council orientation debate on 6 and 7 March 2014 must be mentioned. These two Member States find it highly desirable to create a specific review that would evaluate the functioning of the EPPO after 5 years, including an assessment of its actual independence and efficiency, no matter which

³⁶⁵ CCBE, "CCBE response to a proposal for a European Public Prosecutor", 29 November 2013, p. 2-3, <http://www.ccbe.eu/>, accessed 12 April 2014.

³⁶⁶ A. KLIP, "Een Europees Openbaar Ministerie", Ed., *DD*, 2013, afl. 9, p. 652-653.

³⁶⁷ Meijers Committee, "Note Meijers Committee on the proposed Council Regulation on the establishment of the European Public Prosecutor's Office (COM (2013) 534 final)", CM 1315, 25 September 2013, p. 2, <http://www.commissie-meijers.nl>, accessed 27 March 2014.

model and structure ultimately becomes reality.³⁶⁸ Whether this suggestion will be taken up in the future EPPO regulation cannot be answered yet.

3.3. Procedural safeguards

One of the advantages of the EPPO put forward is that the proposed EPPO regulation provides in the Articles 32-35 the protection for the involved individuals and companies by ensuring strong EU procedural safeguards. Also a sign of security of procedural rights to EU citizens is the fact that intrusive investigation measures shall be subject to judicial authorisation by the competent national court.³⁶⁹ With regard to the admissibility of evidence the fundamental rights also play a key role because the evidence will only be admissible if it would not adversely affect the fairness of the procedure or the rights of defence.³⁷⁰

However, there are still some questions raised about the sufficiency of these procedural safeguards. The Council of the European Union did not agree yet on whether the EPPO proposal is sufficient to protect certain fundamental rights and whether the Charter of Fundamental Rights or national rules should apply, so there are still different proposals on guarantees for the suspects, accused and victims on the table that need to be further examined.³⁷¹

The CCBE believes it is unfortunate that the current EPPO proposal makes reference to “*in accordance with national law*”³⁷². They think it would be better to provide the accused with fundamental safeguards on a standard uniform basis because issues such as the right to silence or the availability of legal aid vary dramatically between Member States and this causes unequal treatment. Implementing those procedural safeguards solely in accordance with national law brings along the risk that the choice of trial Member State could dramatically affect the procedural rights of the person involved and thus the outcome of the prosecution. The CCBE thinks that this will encourage the practice of forum shopping by the EPPO in letting the choice for Member States’ jurisdiction depend on which Member State has the strongest procedural safeguards. The CCBE concludes with stating that they “*see no reason in principle why prosecution powers are spelled out in*

³⁶⁸ J. BERG, “EU Member States positions on EPPO: Enough for the EU to be a strong and committed crime-buster?”, 12 March 2014, <http://www.transparencyinternational.eu/>, accessed 12 April 2014.

³⁶⁹ Article 26 (4 and 5) proposed EPPO regulation

³⁷⁰ Article 30 (1) proposed EPPO regulation.

³⁷¹ J. BERG, “EU Member States positions on EPPO: Enough for the EU to be a strong and committed crime-buster?”, 12 March 2014, <http://www.transparencyinternational.eu/>, accessed 12 April 2014.

³⁷² Articles 33, 34 and 35 proposed EPPO regulation.

great detail but defence rights are not. The proposal should set out in a comprehensive but non-exhaustive manner, these important procedural safeguards. Failure to do so is to squander an opportunity to promote approximation of real benefit to citizens”.³⁷³

KLIP agrees with this reasoning of the CCBE that there should be specific European provisions on the procedural safeguards. According to this author, the EPPO proposal refers to the applicable national law because it assumes that it will be clear from the beginning in which Member State the prosecution and trial will take place and that every prosecution will naturally end in a criminal procedure. However, these two assumptions are incorrect. It will obviously not always be clear from the beginning in which Member State the trial will take place, as the EPPO will be competent for offences which often have a cross-border dimension. Also, even if it would be clear in which Member State the trial will take place, it cannot be assumed that every prosecution ends in a trial since criminal investigations often result in the conclusion that there is no punishable offence committed. The procedural safeguards for which the national law is applicable are insufficient given the fact that there will be a phase in the investigations where it will not be clear yet in which Member State the final prosecution/trial will take place. In this phase there is thus no specific national law that governs the accused’s procedural safeguards and no specific European provisions, so there is no clarity for the accused person on which authority he/she should address to protect these rights.³⁷⁴ The future EPPO regulation should set out these important procedural safeguards in a comprehensive manner based on specific European provisions instead of creating a hiatus in making them depend on the national law of the trial venue.

III. Relationship with other bodies

“In so far as necessary for the performance of its tasks, the EPPO may establish and maintain cooperative relations with Union bodies or agencies in accordance with the objectives of those bodies or agencies, the competent authorities of third countries, international organisations and the International Criminal Police Organisation (Interpol)”.³⁷⁵

³⁷³ CCBE, “CCBE response to a proposal for a European Public Prosecutor”, 29 November 2013, p. 3, <http://www.ccbe.eu/>, accessed 12 April 2014.

³⁷⁴ A. KLIP, “Een Europees Openbaar Ministerie”, Ed., *DD*, 2013, afl. 9, p. 651.

³⁷⁵ Article 56 (1) proposed EPPO regulation.

According to the European Commission, the principle of loyal cooperation provides an obligation on the relevant Union bodies, including Europol, Eurojust and OLAF, to actively support the investigations and prosecutions of the EPPO and to cooperate with it to the fullest extent possible.³⁷⁶

1. Eurojust

1.1. 'From Eurojust'

The relationship between the EPPO and Eurojust has always been a contested one. As both the option of strengthening Eurojust and the option of establishing an EPPO were taken up in the TFEU and Article 86 TFEU explicitly states that the EPPO may be established "*from Eurojust*", there are some who believe that a strengthened Eurojust alone is sufficient and the need to set up an independent EPPO is abrogated by this. In chapter three this statement is rebutted. There is not only a need for a strengthened Eurojust but parallel also for a supranational and independent EPPO. The European Commission supports this parallel approach: "*The implementation of Article 86 TFEU, combined with an efficiently functioning Eurojust, is considered the optimal solution*".³⁷⁷

Supporters of Eurojust however persisted in saying that the words "*from Eurojust*" must be explained in the sense that there are three options for establishing an EPPO: Eurojust becoming the EPPO, establishing the EPPO within the structure of Eurojust or a merge between the EPPO and Eurojust. However, a clear choice has been made for the EPPO as a separate entity.³⁷⁸ According to LIGETI and SIMONATO there is no doubt that the EPPO must be different from Eurojust. The two bodies must be viewed separately because they are not part of the same type of measures. The Treaty of Lisbon distinguishes in Article 67 (3) TFEU four types of measures in order to achieve the objectives of the area of freedom, security and justice: measures linked to cooperation and coordination, measures based on mutual recognition, measures providing for an approximation of criminal laws and measures to prevent and combat crimes. Eurojust is clearly a body that facilitates cooperation and

³⁷⁶ European Commission, Proposal for a Council Regulation on the establishment of a European Public Prosecutor, COM (2013) 534 final, Brussels, 17 July 2013, p. 10, <http://eur-lex.europa.eu/>, accessed 29 March 2014.

³⁷⁷ European Commission, Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee on the Regions – Better protection of the Union's financial interests: Setting up the European Public Prosecutor's Office and reforming Eurojust, COM (2013) 532 final, Brussels, 17 July 2013, p. 4, <http://ec.europa.eu/>, accessed 16 April 2014.

³⁷⁸ For more information on this, see *supra*, part II: How the EPPO would function in practice, 1. Organisation and structure, 1.1. Different models, 1.1.2. The EPPO as a separate entity.

coordination between the Member States, while the EPPO is a tool to prevent and combat crimes against the financial interests of the EU effectively.³⁷⁹

The exact meaning of the expression “*from Eurojust*” is left deliberately vague to leave the largest possible *marge de manoeuvre* to the legislator. But even though this expression is not clear, the prominent role that Eurojust is called upon to play in the EPPO is certain. The words “*from Eurojust*” simply mean that the best possible synergies need to be made between the EPPO with a direction role and the power to decide, and the reformed Eurojust with a coordination role and the power to ask. Picture 3 gives an idea about how the EPPO and Eurojust would complement each other.

Picture 3: Main features of Eurojust and the EPPO³⁸⁰

	Eurojust	European Public Prosecutor
Role	Coordination of national prosecution authorities	European direction of investigations and prosecution
Scope of offences	Wide range of types of cross-border criminality	Protection of specific Community interests (budget, Euro currency, ...)
Organisation	Collegial	Hierarchical and decentralised (Deputies)
Stage 1 – Information duties	An option for national authorities	An obligation for national authorities
Stage 2 - Investigation	No Communitywide enforcement powers	Communitywide enforcement powers
Stage 3 - Trial	No role	Power to prosecute and to indict

Eurojust and the EPPO will work very closely together on cases concerning crimes against the financial interests of the EU.³⁸¹ Eurojust will contribute to the success of the EPPO with its 12 years of expertise as a key player in international cooperation. REDING states that “*one principle should guide us: the EPPO will be an independent office but its independence will not deprive it from building upon*

³⁷⁹ K. LIGETI and M. SIMONATO, “The European Public Prosecutor's Office: Towards a Truly European Prosecution Service?”, *New Journal of European Criminal Law*, vol. 4, issue 1-2, 2013, p. 11.

³⁸⁰ Working group X “Freedom, Security and Justice”, “A European Public Prosecutor”, document 27, Brussels, 25 November 2002, p. 7, <http://european-convention.eu.int>, accessed 28 April 2014.

³⁸¹ European Commission, Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee on the Regions – Better protection of the Union’s financial interests: Setting up the European Public Prosecutor’s Office and reforming Eurojust, COM (2013) 532 final, Brussels, 17 July 2013, p. 4-5, <http://ec.europa.eu/>, accessed 16 April 2014.

Eurojust's existing resources and creating synergies".³⁸² Next there will be an overview of what the close relationship between the future EPPO and the reformed Eurojust will be according to the proposed regulations.

1.2. Relationship EPPO-Eurojust

The future relationship between the EPPO and Eurojust is described in Article 57 (1) of the proposed EPPO regulation: *"The EPPO shall establish and maintain a special relationship with Eurojust based on close cooperation and the development of operational, administrative and management links between them"*. A similar provision on the relationship with the EPPO is foreseen in Article 41 (1) of the proposed Eurojust regulation, with the addition that *"to the end of this special relationship, the EPP and the President of Eurojust shall meet on a regular basis to discuss issues of common concern"*.

Article 57 (2) of the proposed EPPO regulation contains a list of measures that associate Eurojust with the EPPO's activities in complex or cross-border cases. These measures mainly involve the sharing of information or the requesting of Eurojust to provide the EPPO with certain support. Article 41 (2) of the proposed Eurojust regulation states that Eurojust shall treat any request for support from the EPPO without undue delay and shall deal with such requests as if they had been received from a national authority.

Paragraphs 3, 4 and 5 of Article 57 of the proposed EPPO regulation and paragraphs 3, 4, 5 and 6 of Article 41 of the proposed Eurojust regulation hold similar provisions on the information sharing between the EPPO and Eurojust. Article 57 (3) of the proposed EPPO regulation provides the EPPO with access to a mechanism for automatic cross-checking of data in Eurojust's Case Management System. Article 57 (4) prescribes that the info can only be used for the purpose for which it was provided with a possible exception when that usage falls within the mandate of the body receiving the data and there was a prior authorisation of the body which provided the data. Article 57 (5) grants the EPPO with the power to designate the staff members authorised to have access to the results of the cross-checking mechanism and inform Eurojust thereof.

Lastly, Articles 57 (6) of the proposed EPPO regulation and 41 (7) of the proposed Eurojust regulation contain a list of services that Eurojust will provide to the EPPO and the provision that further details must be regulated by an agreement between Eurojust and the EPPO.

1.3. Advantages of a close partnership

To those who are wondering what the reasons are for establishing such a close relationship between the EPPO and Eurojust, there is only to say that there are several advantages to it. Indeed, according

³⁸² Eurojust News, issue 8, May 2013, p. 6, <http://eurojust.europa.eu/>, accessed 17 April 2014.

to the European Commission's Communication of 2013 there are four main advantages to this partnership: smoother transit of fraud cases, easier coordination of hybrid cases, optimal use of Eurojust's experience and tools, and cost-efficiency.³⁸³

First of all, as the EPPO will have exclusive competence for crimes affecting the financial interests of the Union,³⁸⁴ Eurojust's cases of EU fraud will have to be transferred to the EPPO to ensure consistency. A partnership between these two bodies will only facilitate and stimulate this transition of fraud cases. However, there are certain situations possible in which this crime area will not be entirely stripped from Eurojust's competences. Because given the fact that the UK, Ireland and Denmark will not participate in the functioning of the EPPO and the fact that Article 86 (1) paragraph 2 TFEU foresees in the possibility that nine Member States proceed with the proposal in the form of enhanced cooperation, one can predict with certainty that there will be Member States which will refrain from joining in the EPPO. In relation to those non-EPPO Member States, Eurojust would have to be able to retain its competence in the field of crimes against the EU's financial interests because otherwise there would be no coordination body for these crimes for non-participating Member States. A close partnership will provide a great advantage here as coordinating the actions of the EPPO and non-EPPO Member States by Eurojust in these cases will most certainly be facilitated by it.

Secondly, a close relationship between the EPPO and Eurojust will ensure efficient coordination of hybrid cases where both the EPPO and Eurojust need to be involved because the suspects are involved in both crimes affecting the Union's financial interests and other forms of crime. Close cooperation and coordination in these cases are indispensable to avoid breaches of the *non bis in idem* principle or impunity gaps due to negligence of these connected crimes, so both the proposed EPPO regulation and the proposed Eurojust regulation³⁸⁵ foresee measures of assistance and coordination by Eurojust following a request of the EPPO.

Thirdly, close cooperation between the EPPO and Eurojust will make it possible for the EPPO as a young and inexperienced new EU body to make use of Eurojust's expertise, experience and tools. Eurojust spent the last 12 years gathering experience in e.g. JIT's, the European Arrest Warrant and

³⁸³ European Commission, Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee on the Regions – Better protection of the Union's financial interests: Setting up the European Public Prosecutor's Office and reforming Eurojust, COM (2013) 532 final, Brussels, 17 July 2013, p. 8-9, <http://ec.europa.eu/>, accessed 10 April 2014.

³⁸⁴ Article 14 proposed EPPO regulation.

³⁸⁵ Art. 57 (2) proposed EPPO regulation and Art. 41 (2) proposed Eurojust regulation.

conflicts of jurisdiction.³⁸⁶ The expertise with this casework will be of huge value for the EPPO. Also, Eurojust has got a lot of interesting tools at its disposal, which the EPPO would be able to utilise. To facilitate coordination in hybrid cases³⁸⁷ Eurojust can set up coordination meetings and coordination centres in which the EPPO would be able to participate, make use of on-call coordination and assist in JIT's. Also, establishing a close cooperation between the EPPO and Eurojust could lead to the joining of the delegated prosecutors in the Eurojust National Coordination System³⁸⁸, the ENCS, which ensures coordination at national level of the actions of Eurojust. Participation in this ENCS would provide a valuable source of information to the delegated prosecutors.³⁸⁹

Fourthly, this partnership would encourage the sharing of resources between the EPPO and Eurojust, which would obviously mean that a lot of substantial costs for the EU can be avoided and that the operational effectiveness will be ensured. Indeed, in the proposed EPPO and Eurojust regulations is envisaged that Eurojust will provide support services to the EPPO in administrative issues such as personnel, finance and IT, including using its Case Management System, temporary work files and index. This approach not only delivers considerable cost savings and a convincing economy of scale, it also counteracts unnecessary duplication of functions.

1.4. Eurojust's opinion on the EPPO

Eurojust has always had the opinion that before an EPPO can be established, the need for it has to be proven. In May 2013 Michèle Coninx, President of Eurojust, recognised that there is indeed a need for some form of an EPPO but that it must operate as part of a coherent system, where the functioning of all national and EU actors is coordinated towards the achievement of a common goal. She stressed that Eurojust's experience and competence to prevent and resolve conflicts of jurisdiction will be beneficial to the EPPO. Accordingly, the time has come to step up the fight against EU fraud, possibly through the creation of an EPPO but a complementary relationship between Eurojust and the EPPO is extremely essential.³⁹⁰

³⁸⁶ M. CONINX, "The role of Eurojust in a European Public Prosecutor's Office", presentation at the European Parliament – LIBE hearing, 19 March 2013, p. 14, <http://www.europarl.europa.eu/>, accessed 17 April 2014.

³⁸⁷ Hybrid cases are cases where there are both Member States participating in the EPPO as well as non-participating Member States involved, or cases where there are both crimes affecting the EU's financial interests as well as other serious cross-border crimes involved.

³⁸⁸ Revised Eurojust decision, Art. 12.

³⁸⁹ C. ZEYEN, "The role of Eurojust in a European Public Prosecutor's Office", Conference: The Challenges of Transnational Investigation, Birmingham, 21-23 March 2013, p. 5, <http://www.birmingham.ac.uk/>, accessed 14 April 2014.

³⁹⁰ Eurojust News, issue 8, May 2013, p. 20, <http://eurojust.europa.eu/>, accessed 17 April 2014.

Eurojust further states that it does not have the powers to investigate, prosecute and bring to judgement the suspects of criminal offences with a cross-border dimension. Therefore, it admits that a body based on vertical cooperation with these kinds of powers, like the EPPO, would have an added value and significant effects on the international cooperation between the Member States.³⁹¹

Lastly the opinion of Angeles Gutiérrez-Zarza, legal officer at Eurojust, will be mentioned. In her opinion the EPPO is a fantastic idea and a very efficient solution to the current problems at a theoretical and academic level. However, there is also the practical level that needs to be considered. Practically, she thinks that because the EPPO is such a complicated and complex organisation, it is probably too soon to be established in 2015. There are still too many questions and discussions, including on the relationship and cooperation with Eurojust, which first need to be settled before the establishment of the EPPO can become a reality.³⁹²

2. Europol

2.1. Special relationship

The words in Article 86 (2) TFEU “*the EPPO shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol*” are a first indication of the fact that cooperation with Europol is considered very important for the EPPO.

Indeed, the European Commission views that cooperation with Europol shall be of particular importance to avoid duplication of investigative acts and to enable the EPPO to obtain the relevant information at its disposal.³⁹³ The EPPO will be able to rely on Europol’s analysis and intelligence throughout its investigations.³⁹⁴ That is why in the proposed EPPO regulation there is inserted an Article 58 (1) that states that “*the EPPO shall develop a special relationship with Europol*”. Europol in its turn cannot refuse a request for information by the EPPO and shall provide the EPPO with any relevant information concerning an offence within its competence.

³⁹¹ European Parliament (Directorate-General for internal policies), “Improving Coordination between the EU bodies Competent in the Area of Police and Judicial Cooperation: Moving towards a European Prosecutor”, 18 January 2011, p. 35, <http://www.europarl.europa.eu/studies>, accessed 18 April 2014.

³⁹² Interview with Angeles Gutiérrez-Zarza at Eurojust, The Hague, 11 December 2013.

³⁹³ European Commission, Proposal for a Council Regulation on the establishment of a European Public Prosecutor, COM (2013) 534 final, Brussels, 17 July 2013, p. 14, <http://eur-lex.europa.eu/>, accessed 3 April 2014.

³⁹⁴ Article 21 (1) proposed EPPO regulation.

2.2. Remaining questions

However, there are certain questions about the EPPO-Europol relationship. First of all, it is important to mention the limitation of Europol's powers envisaged in Article 88 (3) TFEU, that states that *“any operational action by Europol must be carried out in liaison and in agreement with the authorities of the Member State or States whose territory is concerned. The application of coercive measures shall be the exclusive responsibility of the competent national authorities”*. The EPPO on the other hand has the power to conduct investigations independently from the Member States, for which it will be able to count on support of Europol for certain investigative measures. However, the question arises as to how Europol will comply with the EPPO when at the same time it has to respect the national privilege to exercise coercive measures. There is no answer to this question in the proposal for a regulation on Europol of 2013³⁹⁵, as part VI about the relationship with its partners is very generic and holds no specific provisions whatsoever on the EPPO. A possible partial solution to this dilemma might be that Europol is given the power to request national police forces to conduct the investigative coercive measures for the EPPO. In this way, Article 88 (3) TFEU is respected while the EPPO still gets the support it needs for conducting its investigations.³⁹⁶

Secondly, there are questions being raised about the meaning of the sentence *“in liaison with Europol”* in Article 86 (2) TFEU. This will be analysed below in part IV on the discussion about the police force of the EPPO.

2.3. Europol's opinion on the EPPO

In principle, Europol supports the creation of an EPPO because they consider it the next logical step after the creation of JIT's and the ICC. However, Europol emphasises that the EPPO's mandate and scope needs to reflect a balanced solution, taking into account the current Europol arrangements, to avoid overlaps and duplications. The future regulation on the EPPO should also go hand in hand with future Europol developments, as otherwise there would be an institutional imbalance between judicial and police cooperation agreements.³⁹⁷

³⁹⁵ European Commission, Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Law Enforcement Cooperation and Training (Europol) and repealing Decisions 2009/371/JHA and 2005/681/JHA, COM (2013) 173 final, Brussels, 27 March 2013, <http://ec.europa.eu/>, accessed 17 April 2014.

³⁹⁶ J. MONAR, *The institutional dimension of the European Union's area of freedom, security and justice*, College of Europe Studies, Brussels, Peter Lang, 2010, p. 186-187.

³⁹⁷ European Parliament (Directorate-General for internal policies), *“Improving Coordination between the EU bodies Competent in the Area of Police and Judicial Cooperation: Moving towards a European Prosecutor”*, 18 January 2011, p. 35, <http://www.europarl.europa.eu/studies>, accessed 18 April 2014.

Representatives at Europol view that in accordance with Article 86 (2) TFEU, it is important for the EPPO to establish a close relationship with Europol, partly because they believe that it is Europol that will carry out the investigations of the EPPO. They strongly argue that the word “*responsible*” in Article 86 TFEU means that the EPPO might be responsible for the process of investigation but that the actual investigations must be carried out by a police authority such as Europol, under the guidance of the EPPO, in accordance with most of the criminal procedural systems of the Member States.³⁹⁸

Lastly the opinion of Roger Van de Sompel, the Belgian Europol liaison officer, must be mentioned. Van de Sompel opines that a form of voluntary cooperation would be better than the obliged cooperation through the EPPO. He elaborates his view by giving the example of information exchange at Europol. This used to be voluntary but in the new Europol regulation³⁹⁹ this became obliged through the Article 7 (5) a: “*Member States shall supply Europol with the information necessary for it to fulfil its objectives*”. Van de Sompel states that this system of obliged information exchange provides much less information in practice than the voluntary system did. So lessons should be learned. Van de Sompel thinks that a supranational EPPO that could take binding decisions will shut the Member States down in that same way. Because he emphasises that although something is obligated at European level, there will always be three escape-routes to refuse cooperation after all: when the life of people is endangered, in the interest of the investigation and when the State Security of a Member State is at risk. So if Member States are not willing to cooperate, they will be able to escape this through these refusal grounds. He adds that Member State cooperation is not an easy matter to achieve, so instead of trying to force Member States it would be better if the EPPO earned the Member States’ cooperation like Eurojust and Europol had to do.⁴⁰⁰

³⁹⁸ European Parliament (Directorate-General for internal policies), “Improving Coordination between the EU bodies Competent in the Area of Police and Judicial Cooperation: Moving towards a European Prosecutor”, 18 January 2011, p. 35, <http://www.europarl.europa.eu/studies>, accessed 18 April 2014.

³⁹⁹ European Commission, Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Law Enforcement Cooperation and Training (Europol) and repealing Decisions 2009/371/JHA and 2005/681/JHA, COM (2013) 173 final, Brussels, 27 March 2013, <http://ec.europa.eu/>, accessed 18 April 2014.

⁴⁰⁰ Interview with Roger Van de Sompel at Europol, The Hague, 12 December 2013.

3. OLAF

3.1. Overlapping competences

Article 58 (3) of the proposed EPPO regulation states that *“the EPPO shall cooperate with the Commission, including OLAF, for the purpose of implementing the obligations under Article 325 (3) of the TFEU. To this end, they shall conclude an agreement setting out the modalities of their cooperation”*. In Article 66 (1, 3 and 4) there are provisions that further elaborate in detail on the relationship between the EPPO and OLAF.

This amount of provisions in the proposed EPPO regulation clarifies that a close relationship between the EPPO and OLAF needs to be established. Indeed, the European Commission confirms this by stating that cooperation between the EPPO and OLAF is of particular importance to avoid duplication and to enable the EPPO to obtain the relevant information at OLAF’s disposal.⁴⁰¹ However, problems might arise from this relationship because there will be certain tasks of the EPPO that will overlap with those of OLAF. According to Article 1 (4) of the new OLAF regulation of 2013⁴⁰², OLAF is competent to carry out administrative investigations related to irregularities that might also constitute criminal offences against the EU’s financial interests. The EPPO shall be responsible for investigating perpetrators of offences against the EU’s financial interests.⁴⁰³ These overlapping competences will cause inefficient duplications of administrative and criminal investigations into the same facts. The question arises as to whether OLAF will be able to keep performing its investigative functions if the EPPO were to be established, because the EPPO will have exclusive competence to investigate this type of crime. No answer is provided in the TFEU or in the OLAF regulation. The OLAF regulation’s sole provision in accordance with the EPPO is that *“the Commission should assess the need for revision of this Regulation in the event that an EPPO is established”*.⁴⁰⁴

⁴⁰¹ European Commission, Proposal for a Council Regulation on the establishment of a European Public Prosecutor, COM (2013) 534 final, Brussels, 17 July 2013, p. 14, <http://eur-lex.europa.eu/>, accessed 5 April 2014.

⁴⁰² European Parliament and Council of the European Union, Regulation 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, 883/2013, 11 September 2013, *Official Journal of the European Union*, L 248, 18 September 2013.

⁴⁰³ Article 86 (2) TFEU.

⁴⁰⁴ European Parliament and Council of the European Union, Regulation (EU, Euratom) 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, 883/2013, 11 September 2013, *Official Journal of the European Union*, L 248, 18 September 2013, p. 5.

There are very different opinions on this. On the one hand there are some authors who think that OLAF should be given, next to its administrative investigation powers, even further judicial investigation powers that it could exert under the direction of the EPPO, so that OLAF could serve as the EPPO's investigative police unit. They believe that these extended powers of OLAF would be the true manifestation of the obligation in the EPPO proposal that the relevant EU bodies, including OLAF, are obliged to actively support the activities of the EPPO and to cooperate with it *"to the fullest extent possible"*.⁴⁰⁵ On the other hand the European Commission considers that OLAF would no longer have the power to conduct administrative investigations, let alone the power to conduct criminal investigations: *"Given the exclusive competence of the EPPO to deal with offences against the EU's financial interests, such cases can no longer be subject of administrative investigations by OLAF, or if they are, they must be transferred in cases where a criminal suspicion arises"*.⁴⁰⁶ The only investigative powers that OLAF will be able to maintain are those in areas which do not fall under the competence of the EPPO, such as irregularities affecting the EU's financial interests and serious misconduct or crimes committed by EU staff without a financial impact.⁴⁰⁷ Also, OLAF will have investigative powers if specifically envisaged in the proposed EPPO regulation. Article 66 (3) of the proposed EPPO regulation states that *"OLAF may carry out investigations, including on-the-spot checks and inspections, with a view to establishing whether there have been any irregularities affecting the financial interests of the Union in connection with expenditure funded by the European Public Prosecutor's Office"*. Provisions on such investigations will be set out in working arrangements, contracts, grant agreements and grant decisions of the EPPO.⁴⁰⁸

3.2. Adjustments to OLAF

OLAF will most probably no longer be capable of performing some of its current functions so there will be necessary adjustments to its competence. For example, instead of conducting investigations itself, OLAF will have to report suspicions of criminal offences against the EU's financial interests brought to its attention at the earliest stage to the EPPO. This will induce a speedier investigation

⁴⁰⁵ V. COVOLO, "From Europol to Eurojust – towards a European Public Prosecutor. Where does OLAF fit in?", *eucri*, 2012/2, p. 86.

⁴⁰⁶ European Commission, Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee on the Regions – Better protection of the Union's financial interests: Setting up the European Public Prosecutor's Office and reforming Eurojust, COM (2013) 532 final, Brussels, 17 July 2013, p. 7, <http://ec.europa.eu/>, accessed 13 April 2014.

⁴⁰⁷ European Commission, "Every euro counts. Frequently Asked Questions on the European Public Prosecutor's Office", memo/13/693, Brussels, 17 July 2013, p. 7, <http://europa.eu/rapid/press-release>, accessed 17 April 2014.

⁴⁰⁸ Article 66 (4) proposed EPPO regulation.

process and will help to avoid duplications of investigations. What will also speed up the investigation process is that OLAF, although it will no longer have the power to conduct investigations, will provide assistance to the EPPO on request as it already does today to national prosecutors.

Further adjustments to OLAF's legislative framework will be proposed by the European Commission, according to the new OLAF regulation to take account of the establishment of the EPPO, and should enter into force concurrently with the EPPO regulation.⁴⁰⁹

3.3. Budgetary implications

The EPPO proposal seeks to be cost-efficient for the EU budget by using resources of other EU bodies as much as possible. To avoid duplication of administrative and criminal investigations, a part of OLAF's resources will be used for setting up the central headquarters of the EPPO. Specialised staff members with significant experience in cooperating with national criminal authorities will be gradually transferred from OLAF to the EPPO, as the set-up phase of the EPPO will probably take several years.⁴¹⁰ This allocation of a large amount of staff to the EPPO will not cause a problem for OLAF as it will no longer itself carry out administrative investigations where there are suspicions of a criminal behaviour involving the Union's financial interests, due to the exclusivity of the EPPO's competence. So despite the reduction of staff, adequate staffing will remain at OLAF to enable it to exercise its remaining competence, including the strengthening of cooperation between the Member States in the field of fraud prevention, developing methods for the fight against fraud, setting in motion any other operational activity in the fight against fraud, maintaining direct contact with the national law enforcement and judicial authorities, and representing the European Commission in the field of fraud prevention.⁴¹¹

Also cost-efficient is the fact that OLAF would contribute to the EPPO with specialised support, such as forensic analysis, technical and operational support to investigations, and support for the

⁴⁰⁹ European Commission, Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee on the Regions – Better protection of the Union's financial interests: Setting up the European Public Prosecutor's Office and reforming Eurojust, COM (2013) 532 final, Brussels, 17 July 2013, p. 9, <http://ec.europa.eu/>, accessed 17 April 2014.

⁴¹⁰ European Commission, Proposal for a Council Regulation on the establishment of a European Public Prosecutor, COM (2013) 534 final, Brussels, 17 July 2013, p. 8, <http://eur-lex.europa.eu/>, accessed 11 April 2014.

⁴¹¹ Article 1 (2) new OLAF regulation.

establishment of evidence in criminal cases. The current networks which OLAF has developed over the years in the area of anti-fraud investigations will also be at disposal of the EPPO.⁴¹²

Due to this sharing of resources, duplications of investigations will be avoided so that the investigation time will be reduced and problems of mutual assistance will be reduced or eliminated. The overall costs of law enforcement will be more balanced as a result of these efficiency gains and the chances of a successful prosecution will increase.⁴¹³

3.4. OLAF's opinion on the EPPO

According to OLAF, the need for the creation of an EPPO has been recognised very early in the *Corpus Juris* of 1997, which was even before the creation of OLAF itself in 1999. From the beginning OLAF has constantly supported the creation of an EPPO. KESSLER⁴¹⁴ believes that "*the setting-up of this ambitious project will boost the EU's success in fighting and deterring EU fraud because the EPPO will improve the conditions for investigating and prosecuting crimes affecting the EU budget*".⁴¹⁵ OLAF acknowledges the need for an EPPO because it admits that its own activities of investigation and cooperation with national prosecution authorities still lack speed and efficiency, and that possible reforms of OLAF and Eurojust in the future will be limited in scope due to a lack of legal basis in the TFEU. An EPPO will definitely create an added value. OLAF understands that if the EPPO is created, its role will have to be redefined and accepts this consequence. Similar to Europol, OLAF thinks that according to Article 86 TFEU, the EPPO is merely responsible for the process of investigation and that the actual investigations must be carried out by other authorities under the guidance of the EPPO.⁴¹⁶

⁴¹² European Commission, Proposal for a Council Regulation on the establishment of a European Public Prosecutor, COM (2013) 534 final, Brussels, 17 July 2013, p. 52-53, <http://eur-lex.europa.eu/>, accessed 11 April 2014.

⁴¹³ European Commission, Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee on the Regions – Better protection of the Union's financial interests: Setting up the European Public Prosecutor's Office and reforming Eurojust, COM (2013) 532 final, Brussels, 17 July 2013, p. 8, <http://ec.europa.eu/>, accessed 17 April 2014.

⁴¹⁴ Giovanni Kessler is the Director-General of OLAF.

⁴¹⁵ OLAF, "Commission puts forward plans for a European Public Prosecutor's Office", 17 July 2013, <http://ec.europa.eu/>, accessed 25 April 2014.

⁴¹⁶ European Parliament (Directorate-General for internal policies), "Improving Coordination between the EU bodies Competent in the Area of Police and Judicial Cooperation: Moving towards a European Prosecutor", 18 January 2011, p. 32-40, <http://www.europarl.europa.eu/studies>, accessed 18 April 2014.

IV. EPPO: own police force (?)

Currently a hot topic is the question as to which body will perform the investigations of criminal activities falling within the competence of the EPPO: the EPPO's own police forces or the investigative forces of the Member States or Europol/OLAF.

Article 86 TFEU provides no clear answer to this question. The provision that "*the EPPO shall be responsible for investigating, prosecuting,... where appropriate in liaison with Europol,...*" even increases the confusion as such a formulation fails to provide an appropriate solution. One might wonder whether this formulation must be understood in such a way that the EPPO is merely responsible for the investigations but confers the actual investigating powers upon another authority.

Europol and OLAF

Europol itself seems to answer the abovementioned question affirmatively. It makes a strong case of the fact that not the EPPO itself with its own investigative body but a police authority must carry out the investigations because this is also the practice in most of the criminal procedural systems of the Member States.⁴¹⁷ Because of the provision "*in liaison with Europol*" in Article 86 (2) TFEU, Europol argues that this role of police authority is clearly foreseen for Europol. However, Europol thinks that if a body of own EPPO investigators were to be established, they should be housed within the Europol environment to avoid duplications of investigations, analyses and operational support, and that Europol officers should be granted investigative competence under the EPPO.⁴¹⁸

Also OLAF was asked whether it thinks that the EPPO should have its own investigative police force or whether it should be the Europol or OLAF investigators who are granted with the powers to perform direct judicial investigations under the EPPO. OLAF answered that the only thing that matters in the end is that there is an equivalent level of protection of the EU budget throughout all the Member States. However, OLAF thinks that such equivalence and consistency would be best achieved through an independent criminal investigative body which is supervised by the EPPO. This function could possibly be achieved by OLAF, bringing a clear added value to OLAF's functions compared to the purely administrative investigative powers it currently has.⁴¹⁹ VAN DEN WYNGAERT agrees with OLAF and believes that "*OLAF should be the EPPO's 'police service', the investigative arm,*

⁴¹⁷ *Ibid*, p. 35.

⁴¹⁸ *Ibid*, p. 40.

⁴¹⁹ *Ibid*, p. 40.

detecting fraud and collecting the evidence to be eventually produced in court". She suggests that the International Criminal Court should be a source of inspiration, since the ICC's office of the prosecutor consists of three divisions: investigations, prosecutions and jurisdiction, complementarity and cooperation. According to VAN DEN WYNGAERT's reasoning, it should thus be OLAF that carries out the investigations, the EPPO and the national authorities carrying out the prosecutions and jurisdiction, and the EPPO working together with Eurojust in the area of complementarity and cooperation. Such an integration of services in the EPPO seems a better solution to her than having those offices "coexist as separate islands with the unavoidable turf wars as a result".⁴²⁰

So it is clear that Europol and OLAF both think that they should be the investigative 'police force' for the EPPO. It would be most logical that if such an EU body were to be selected for this function, it would be Europol. Article 86 (2) clearly illustrates this with the wording "*in liaison with Europol*".

Member States' authorities

It is very probable that the Member States are not prepared to transfer such a measure of their sovereignty to the EU. An own police force or a police force housed at Europol or OLAF is thus not desirable and it would be more suited for the EPPO to rely on the national investigative authorities. Although the proposed EPPO regulation has no specific rules on which body will actually carry out the investigations, there are several provisions that point in the direction of the national investigative authorities. For example, Article 18 (1) of the proposed EPPO regulation states that "*the designated European Delegated Prosecutor may either undertake the investigation measures on his/her own or instruct the competent law enforcement authorities in the Member State where he/she is located*". This clarifies that if the delegated prosecutors are not undertaking the measures themselves, they can instruct the competent national law enforcement authorities to undertake the investigation. Also an indication is that Article 18 (6) of the proposed EPPO regulation states that if an investigation is undertaken by the EPP directly "*any investigation measure conducted by the EPP shall be carried out in liaison with the authorities of the Member State whose territory is concerned. Coercive measures shall be carried out by the competent national authorities*".

So as a rule it will be the delegated prosecutors who will carry out the investigation and prosecution in their Member State, using national police staff and applying national law⁴²¹. This is the essence of the decentralised structure. This practice will have the advantage that national expertise is directly

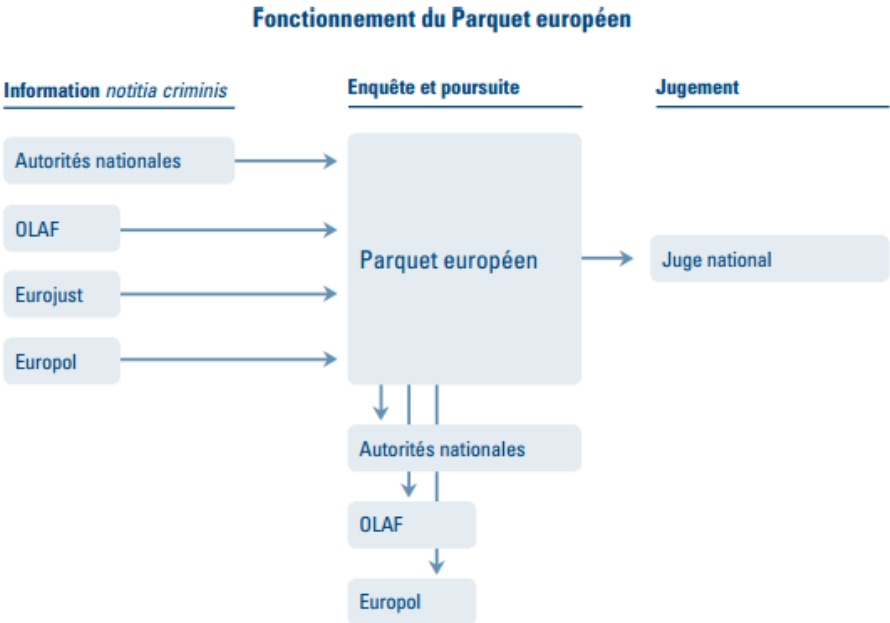
⁴²⁰ Eurojust News, issue 8, May 2013, p.3, <http://eurojust.europa.eu/>, accessed 18 April 2014.

⁴²¹ However, according to Article 11 (3) of the proposed EPPO regulation, national law shall only apply to the extent that a matter is not regulated by this Regulation.

accessible to the EPPO, such as knowledge of the local language, integration into the local prosecution structure and practice in handling local court cases. Indeed, since the national law will often apply to the investigations of the EPPO, it would be best if the national authorities carry out the investigations as they possess an in-depth knowledge of the national judicial system. Also, only the national authorities will be able to arrest people for offences within the EPPO’s competence. According to Article 26 (7) of the proposed EPPO regulation, it will only be allowed for the EPPO to request the judicial authorities to arrest a suspect if it is absolutely necessary for the investigation and if less intrusive measures cannot achieve the same objective.⁴²²

Although the national authorities will mainly carry out the investigations, it is only natural that Europol and OLAF are not excluded from this. The EPPO needs to establish close relationships with these bodies and since they both have developed great levels of expertise with investigations and information gathering, it would be inefficient not to include them in investigations. The practical functioning of the EPPO is set out in picture 4.

Picture 4: Practical functioning of the future EPPO⁴²³



Picture 4 shows how the EPPO ideally could function. It would get notified mainly by national authorities, OLAF, Eurojust and Europol when there is any conduct which might constitute an offence

⁴²² European Commission, “Every euro counts. Frequently Asked Questions on the European Public Prosecutor’s Office”, memo/13/693, Brussels, 17 July 2013, p. 7, <http://europa.eu/rapid/press-release>, accessed 17 April 2014.

⁴²³ F. DE ANGELIS, “L’espace judiciaire pénal européen: une vision se concrétise”, *eucri*m, 2012/2, p. 78.

within the EPPO's competence. Surely also other EU institutions or agencies must inform the EPPO if they are aware of such offences being committed. The investigation and prosecution would be led by the EPPO, which would send orders or requests for measures of investigation mainly to the national authorities but also to OLAF and Europol. In the last phase the EPPO will send the case over to a national judge for trial.

Conclusion

This thesis aims to provide an answer to the questions whether a federal EPPO is needed, desirable and feasible considering the current situation and politics. Some of these answers seemed a no-brainer but during the writing of this thesis it got more and more obvious that reality and perception are often two different things and that in many cases pure black-and-white answers cannot be provided.

The analysis of the current national prosecution of financial offences and the losses detrimental to the EU budget brought several problems into focus. The first problem is that the prosecution level in Member States varies widely, creating the possibility for criminals to forum shop. The second problem is that the prosecution level in Member States is too low because of the issues a cross-border dimension entails, creating impunity and a low deterrence level. The current intergovernmental approach is not sufficient to effectively protect the financial interests of the EU and solve these problems. Indeed, as the European Commission demonstrated, a supranational EU body like the EPPO would not violate the subsidiarity principle and would provide a genuine added value in solving the conflicts of jurisdiction and deficiencies in the international cooperation.

After having established that such an action at EU level is necessary, the next important question was whether it is justified to create a new EPPO when the TFEU also provides the possibility to strengthen the already existing Eurojust. Although it is correct that Article 85 TFEU foresees the possibility for Eurojust to coordinate, solve conflicts of jurisdiction and initiate investigations with binding powers, the answer to the question is still affirmative. Because these are the maximum powers that Eurojust could ever get. Truly prosecuting and bringing to judgement like the EPPO is something it will never be able to do. A strengthened Eurojust does not abrogate the EPPO but rather complements it.

The first three chapters of this thesis have altered the main questions. It became more and more clear that the need for an EPPO was an undeniable fact and it became less and less obvious how the EPPO should eventually be organised. The question was thus no longer whether 'if' there would be an EPPO but shifted to wondering 'how' the EPPO will be formed. That is why it was important to examine the feasibility of the EPPO, analysing the decision-making process, its practical functioning and its relationships with Eurojust, Europol and OLAF. While the previous chapters provided a clear answer to the questions whether the EPPO is needed and desirable, this chapter created many

doubts. Already when analysing the decision-making procedure needed to adopt an EPPO regulation, the first inconsistency appears. Article 86 TFEU makes it possible to adopt an EPPO regulation through enhanced cooperation with only nine Member States. One of the advantages of the EPPO is that it would end the varying prosecution levels and thus the practice of forum shopping. But the question is whether the EPPO will not further stimulate the forum shopping instead of reducing it, as the non-participating Member States will probably serve as new safe havens for fraudsters.

Other doubts derive from the proposal for an EPPO regulation, which is nowhere near comprehensive and leaves a lot to the imagination. Important for the good functioning of the EPPO is to create a balance between approximated European rules and domestic national rules combined with the mutual recognition principle. This is positive as the EPPO will be a catalyst for approximation, which up until now appeared to be impossible to reach. However, the current proposal does not provide sufficient approximated rules, leading to several technical problems. To start with, the proposal deliberately leaves a series of issues to national law to avoid that the EPPO regulation could be considered as disproportionate. Although intended well, this legislative choice may harm the equal treatment of individuals. E.g. the fact that there is a strictly national judicial review and not enough common procedural safeguards will lead to the feeling amongst EU citizens that it will be possible for the EPPO to engage in forum shopping.

The lack of approximation is also negative for the establishment of competence by the EPPO, as the proposal does not provide an own definition of the offences for which the EPPO will be competent. Instead, for the definition of these offence is referred to a directive, which means that the EPPO's competence will depend on the different national implementations of the definitions. This situation seems highly inconsistent and could create legal uncertainty and unequal treatment. The question arises as to why the proposal did not provide a directly applicable definition of the offences within the EPPO's competence. Also a negative consequence of the lack of approximation in the proposal is the fact that the foreseen automatic admissibility of evidence gathered by the EPPO is likely to never work in practice. Member States' rules on the gathering and admissibility of evidence still differ too greatly, so the fact that the EPPO just decides that all evidence gathered must be admissible in every Member State without being accompanied by any kind of minimum norms, appears like skipping a crucial step in the process.

The insufficient level of approximation is not the only thing in the proposal that is worrying. Also the fact that the EPPO will have exclusive jurisdiction over the prosecution of financial offences, even without a cross-border element, might be a bridge too far. Because the fact that they will not be able to prosecute is likely to discourage Member States to investigate EU fraud cases thoroughly and this

will lead to less amounts of information available to the EPPO. Also it is quite hypocritical that the EPPO is considered legitimate “*because Member States do not take sufficient action to protect the financial interests of the EU*”, while the EPPO would now only further discourage that Member States take action. A more complementary relationship between the EPPO and the Member States seems appropriate. The possibility should exist for the EPPO to investigate and prosecute EU fraud cases both with and without cross-border elements effectively from the beginning, but without excluding the possibility for Member States to take initiatives in pure national cases.

As an overall conclusion it seems clear that the establishment of the EPPO is needed, desirable and feasible but that numerous reforms and changes to the proposal will be necessary for the EPPO to function properly in practice. The only thing left to do is hope that the critical remarks and insights of academics and practitioners, some of which set out in this thesis, will be taken into account by Member States when adopting the future EPPO regulation.

To be continued...

Dutch summary

De bedoeling van deze masterproef is om na te gaan of het Europees Openbaar Ministerie, hierna 'EOM', als supranationaal EU lichaam bevoegd voor het onderzoeken en vervolgen van misdrijven tegen de financiële belangen van de EU, terecht het voorwerp uitmaakte van een voorstel van de Europese Commissie op 17 juli 2013. Hiervoor wordt een antwoord gezocht op de drie kernvragen: of het EOM noodzakelijk, wenselijk en haalbaar is. Na het analyseren van beleidsdocumenten van de EU, rechtsleer, rechtspraak, artikels op het internet en interviews met bepaalde personen bij Eurojust en Europol, is het gelukt om tot een algemene conclusie te komen.

1. Achtergrond van het EOM

In het eerste hoofdstuk over de achtergrond van het EOM wordt vooral focus gelegd op de tegenstelling tussen intergouvernementele en supranationale beslissingsprocedures. Hoewel de Lidstaten in het algemeen niet altijd even bereidwillig zijn om delen van hun soevereine beslissingsmacht af te staan, werd in het begin van de jaren '90 van vorige eeuw toch ingezien dat de nationale aanpak niet meer volstond om de vele gevallen van fraude tegen het EU budget tegen te gaan. Naarmate de tijd vorderde werden er meer en meer bevoegdheden op het gebied van Europees strafrecht overgedragen van de Lidstaten naar de EU door de Verdragen van Maastricht, Amsterdam en Lissabon. Verscheidene initiatieven van de Europese Commissie, zoals het *Corpus Juris* van 2000 en het Groenboek van 2001, hebben het EOM in kaart gebracht.

Uiteindelijk werden de artikels 85 en 86 in het VWEU opgenomen en creëerden een nieuw dilemma tussen de versterking van Eurojust en de oprichting van een EOM. De verwarring was dus helaas nog steeds niet verdwenen, aangezien deze twee artikels de voortzetting verzekerden van het intergouvernementeel vs. supranationaal-debat maar nu in de vorm van Eurojust vs. het EOM. Dit hoofdstuk over de achtergrond van het EOM bewijst vooral dat hoewel het EOM zeer recent is opgedoken in een voorstel, dit niet kan worden beschouwd als een revolutie omdat dit idee reeds decennia geleden werd gelanceerd. Het EOM werd in de jaren '90 lang voor zijn tijd op de EU agenda gezet maar na de verdere evolutie kan het nu wel beschouwd worden als de logische volgende stap.

2. Noodzakelijkheid van het EOM

Het EOM lijkt dan wel de volgende logische stap maar de vraag moet worden gesteld of het EOM ook echt noodzakelijk is. Daarom wordt in hoofdstuk twee eerst geanalyseerd wat de schade is die aan het EU budget toegebracht is geweest de afgelopen jaren. Nadat vaststaat dat het EU budget te kampen heeft met ernstige verliezen die jaarlijks stijgen, wordt onderzocht wat hiervoor de oorzaken kunnen zijn. Er worden twee oorzaken geïdentificeerd: ten eerste varieert het niveau van vervolging van misdrijven tegen de financiële belangen van de EU enorm tussen de verschillende Lidstaten, wat de mogelijkheid biedt voor criminelen om te *forum shoppen*, en ten tweede is het niveau van vervolging in de Lidstaten zeer laag, wat leidt tot straffeloosheid en een weinig ontradend effect. De problemen die dit lage niveau van vervolging veroorzaken, verschillen naargelang er sprake is van een grensoverschrijdend element of niet. Zonder grensoverschrijdend aspect kan de zaak volledig gesitueerd worden in één Lidstaat die de zaak dan nationaal zal afhandelen, wat in een groot deel van de gevallen leidt tot niet-mededeling aan het parket en/of administratieve transacties. Is er wel sprake van een grensoverschrijdend aspect dan ontstaan er in de meeste gevallen jurisdictieconflicten en moeilijkheden in de internationale samenwerking.

Dat deze problemen bestaan, wordt niet ontkend door de Lidstaten. Maar het EOM-voorstel voldoet volgens hen niet aan de subsidiariteitsvereiste. Daarom voerde de Europese Commissie in een mededeling deze subsidiariteitstoets uit en concludeerde dat het EOM-voorstel behouden moest worden omdat het wel voldoet aan deze vereiste. De huidige problemen kunnen volgens de Europese Commissie niet voldoende opgelost worden door de Lidstaten, bestaande EU lichamen en aangekondigde wetsvoorstellen, en slechts een EOM zou een waardige oplossing kunnen bieden voor de huidige inadequate vervolgingspraktijk van financiële misdrijven.

Dat er dus dringend nood is aan een interventie op EU niveau staat buiten kijf, maar de vraag die nu moet worden gesteld is of het oprichten van een nieuw EOM wel wenselijk is wanneer er in artikel 85 VWEU ook voorzien is in een mogelijkheid tot het versterken van het bestaande Eurojust.

3. Wenselijkheid van het EOM

Hoofdstuk drie is gebaseerd op de kritiek dat er onnodig veel tijd en geld verspild zou worden als een EOM zou worden opgericht, terwijl de versterking van het bestaande Eurojust reeds voldoende zou zijn om de huidige problemen in de vervolging van financiële misdrijven op te lossen. In dit hoofdstuk wordt onderzocht of het versterken van de bevoegdheden van Eurojust voldoende is om de creatie van een EOM af te schaffen.

Het antwoord op deze vraag wordt negatief beantwoord. De huidige werkwijze van Eurojust wordt gekenmerkt door niet-bindende bevoegdheden, een hoge graad van afhankelijkheid van de Lidstaten, een te breed toepassingsgebied en veel tijdverspilling. Veel van deze inefficiënties zouden behouden blijven zelfs al wordt Eurojust aangepast op basis van artikel 85 VWEU. Wat wel zou veranderen, is het feit dat Eurojust nu op een bindende manier een onderzoek zou kunnen initiëren en jurisdictieconflicten zou kunnen oplossen. Echter, in het voorstel inzake Eurojust van 17 juli 2013 werd geen gebruik gemaakt van deze mogelijkheden voorzien in artikel 85 VWEU.

Maar zelfs al zouden de mogelijkheden voorzien in artikel 85 VWEU volledig gerealiseerd worden, dan nog zou Eurojust maximaal de onderzoeken bindend kunnen inleiden. Bindende bevoegdheden m.b.t. de vervolging kan Eurojust nooit toegewezen krijgen aangezien er geen wettelijke basis voor is. Artikel 85 VWEU bepaalt immers dat Eurojust de vervolging slechts kan “voorstellen”. Ook is er een gebrek aan politieke consensus om de bevoegdheden van Eurojust bindend te maken aangezien dit zou betekenen dat de bestaande structuur en werking van Eurojust drastisch zouden moeten veranderen. Aangezien de Lidstaten in het algemeen tevreden zijn over de werking van Eurojust en het beschouwen als een erg toegankelijke organisatie, lijkt het niet aangewezen dit goed functionerende intergouvernementele lichaam te begiftigen met supranationale bindende bevoegdheden.

Het versterken van Eurojust is dus in geen geval voldoende om de huidige problemen op te lossen en de nood aan een EOM blijft dus bestaan. Toch is het niet de bedoeling van het EOM om Eurojust te vervangen. Artikels 85 en 86 VWEU mogen niet worden aanzien als een keuze die gemaakt moet worden maar wel als twee complementaire maatregelen die tegelijk ontwikkeld moeten worden en elkaar zullen versterken. Een samenwerking tussen het nieuwe EOM en een versterkt Eurojust is dus van cruciaal belang.

4. Haalbaarheid van het EOM

Nadat vastgesteld is dat het EOM een noodzakelijk en wenselijk instrument is, moet als laatste worden nagegaan of het wel haalbaar is voor dit EOM om ooit naar behoren in de praktijk te functioneren. Om dit te beoordelen moet eerst en vooral worden nagegaan hoe over de verordening betreffende het EOM beslist zal worden. In artikel 86 (1) VWEU staat beschreven dat de EOM-verordening zal aangenomen worden volgens de speciale wetgevende procedure. Echter, aangezien er unanimititeit vereist is in de Raad van de Europese Unie, zal de EOM-verordening hoogstwaarschijnlijk aangenomen worden door slechts een deel van de Lidstaten in de vorm van versterkte samenwerking. Dat het EOM niet echt een volwaardige federale organisatie zal zijn, staat

sowieso al vast aangezien het Verenigd Koninkrijk en Ierland op basis van hun *opt-in* status en Denemarken op basis van diens *opt-out* status reeds hun wens kenbaar maakten om niet deel te nemen aan de verordening. Dit is nogal ironisch. Het EOM wordt immers voorgesteld als een oplossing voor het *forum shopping*, terwijl de creatie van een EOM het *forum shopping* enkel zal stimuleren omdat de niet-deelnemende Lidstaten nieuwe veilige havens zullen worden voor criminelen.

Verder moet worden onderzocht hoe het EOM zal functioneren in de praktijk en ten opzichte van andere EU lichamen zoals Eurojust, Europol en OLAF. Het EOM zal waarschijnlijk de vorm aannemen van een gedecentraliseerd lichaam dat exclusief bevoegd is voor het onderzoeken en vervolgen van misdrijven tegen de financiële belangen van de EU. Gedurende het analyseren van deze verschillende aspecten van het toekomstige EOM, komen heel wat twijfels aan de oppervlakte. De vraag rijst bijvoorbeeld of het wel efficiënt is om het EOM exclusieve bevoegdheid te geven, ook over zaken die volledig gesitueerd kunnen worden in één Lidstaat. Want dit zal niet enkel leiden tot minder beschikbare informatie voor het EOM, ook lijkt het nogal hypocriet dat het EOM wordt aanzien als een noodzaak "*omdat Lidstaten zelf geen actie ondernemen tegen financiële misdrijven*" terwijl het EOM de acties op nationaal niveau uiteindelijk op deze manier nog meer zal ontmoedigen.

Ook moet het vooropgestelde voordeel van het EOM dat het de harmonisering van Europese regels zal stimuleren, met een serieuze korrel zout worden genomen. Immers, het EOM-voorstel bevat slechts voor een paar aspecten een geharmoniseerde EU regeling, terwijl voor het overige wordt verwezen naar het nationale recht van de Lidstaten. Het gebrek aan een eengemaakte definitie, voldoende eengemaakte procedurele waarborgen en de puur nationale rechterlijke controle zal waarschijnlijk leiden tot rechtsonzekerheid, ongelijke behandelingen en de indruk dat het EOM zelf zal *forum shopping* om het beoogde resultaat te bekomen. Ook is het gebrek aan harmonisatie een probleem op het vlak van de ontvankelijkheid van bewijs vergaard door het EOM. Want het EOM-voorstel voorziet een automatische ontvankelijkheid van bewijs en gaat hiermee een brug te ver. Aangezien de regels inzake bewijsvergaring en ontvankelijkheid nog steeds enorm verschillen tussen de Lidstaten, zal de automatische ontvankelijkheid van bewijs gepaard moeten gaan met een zekere vorm van minimum standaarden.

5. Conclusie

Dat een EOM noodzakelijk, wenselijk en haalbaar is, is onmiskenbaar een feit. Er zijn echter heel wat tekortkomingen aan het EOM-voorstel die in de verordening zullen moeten worden aangepakt. Vooral het gebrek aan harmonisatie is een fundamenteel probleem. Ook scheidt het voorstel niet

echt duidelijkheid over de relatie van het toekomstige EOM met Eurojust, Europol en OLAF. Een goede relatie met elk van deze lichamen is uiterst belangrijk en zou beter geregeld moeten worden. Eveneens is er nog steeds discussie over welke autoriteiten de onderzoeken namens het EOM zullen uitvoeren, een eigen eenheid binnen het EOM of de politionele autoriteiten van de Lidstaten en/of Europol/OLAF. In deze fase kan men enkel nog hopen dat de toekomstige EOM-verordening deze tekortkomingen zal oplossen en de inzichten van academici en practici, waarvan sommige uiteengezet in deze masterproef, in rekening zal brengen.

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