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Introduction:

The Stockholm Programme sets out the European Union's (EU) priorities for the area of freedom, security and justice for the period 2010-14[1] and was adopted by the European council at the end of 2009. One of its key objectives is to implement the concept of European citizenship from an abstract idea into a concrete reality. Accordingly, protecting EU citizens is one of the main objectives of the European Commission. This includes securing the interests of EU taxpayers and protecting the fundamental rights of persons under investigation, suspects, accused and convicted persons.

It was the European Commission's Vice-President Viviane Reding who said, *"Criminals who exploit legal loopholes to pocket taxpayers' money should not go free because we do not have the right tools to bring them to justice".* Consequently, the European Commission seized the opportunity provided for by the Lisbon Treaty to propose a package reform based on a multi-faceted integrated approach to tackling EU fraud. In March 2011, the European Commission issued a proposal for a Regulation amending the current European Anti-Fraud Office (OLAF) Regulation to strengthen the efficiency of the Office's investigations.[2] Then, in June 2012, the European Commission proposed a Directive on the fight against fraud to the Union's financial interests by means of criminal law to create greater harmonisation of criminal provisions in this area.[3] Finally, in July 2013, two parallel proposals have been issued on the basis of Articles 85 and 86 of the Treaty on the functioning of the European Union (TFEU). The European Commission issued a Proposal for a Regulation on Eurojust to improve its governance and democratic accountability framework and, ultimately, to

[1] Stockholm Programme: an open and secure Europe serving and protecting citizens (2010/C115/01).
[2] Amended proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1073/1999 concerning investigations conducted by the European Anti-Fraud Office and repealing Regulation (EURATOM) No 1074/1999, SEC(2011) 343 final of 17 March 2011.
[3] Proposal for a Directive on the fight against fraud to the Union's financial interests by means of criminal law, COM (2012) 363 final of 11 July 2012.

strengthen the operational work of Eurojust in the fight against cross-border crime.[4] It further issued a Proposal for a Regulation on the establishment of a European Public Prosecutor's Office (EPPO), a novel European actor that would specifically centralize investigations and prosecutions regarding offences against the financial interests of the EU (PIF crimes) and bring criminals to justice.[5]

This package reform is intended to overcome the current fragmentation of national law enforcement efforts in the prosecution of offences adversely affecting the EU's financial interests. The European Commission argues that the current stand-alone competence of Member States to prosecute offences against the EU budget results in the unequal protection of the EU's financial interests and an insufficient level of deterrence achieved by anti-fraud measures. It is the opinion of the European Commission that an EPPO would better equip the EU for the fight against fraud damaging its budget.

However, as the Director General of DG Justice, Françoise Le Bail, stressed, protecting EU citizens does not only mean protecting the interests of EU taxpayers. She specified that, "*Equally important for us are the procedural rights and the protection of the fundamental rights throughout the criminal investigations undertaken by the EPPO".* In line with this conviction, the European Commission put forward a double package of measures. In addition to the package of measures aimed at fighting PIF crimes more effectively, the European Commission proposed a package of measures on the approximation of criminal procedural law to grant more harmonized rights to suspects and accused persons.[6]

Concerning the concrete proposal published on an EPPO, two pertinent questions emerge:

- Is the Proposal on the table workable, taking into account the spectrum of instruments that already exist at EU level?
- Does it adequately strike a balance between the effectiveness of investigations and prosecution of crimes adversely affecting the EU's financial interests and the respect of fundamental rights of persons under investigation, suspects, accused and convicted persons?

[4] 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 of 17 July 2013.
[5] Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM (2013)534 final of 17 July 2013.
[6] Measure C2, Measure E and Presumption of innocence.

I. Fighting crimes adversely affecting the financial interests of the Union

1. The principle of mutual recognition

The *Corpus iuris* refers to the European Union as a *single legal area*, yet the European Union comprises interactions between 31 different legal systems. Such differences between national legal systems must be taken into account when considering further steps in the fight against PIF crimes at EU level.

As the Lisbon Treaty asserts, EU judicial criminal cooperation, including cooperation in the fight against PIF crimes, is based on the key principle of mutual recognition. This principle builds upon the differences between legal systems and attempts to neutralise the negative impact that these differences may have on criminal judicial cooperation. The application of this principle allows for coordination without harmonisation, and was therefore initially presented as an alternative to the approximation of national legislation. Nonetheless, the approximation of substantive and procedural national criminal legislation, as well as the adoption of measures to prevent and settle conflicts of jurisdiction between Member States, is foreseen in the Lisbon Treaty.

This antagonism can be only resolved through the pivotal principle of mutual trust. Indeed, mutual recognition of judicial decisions among Member States can only function if mutual trust prevails among them. Mutual recognition can only operate effectively in a spirit of confidence, whereby not only judicial authorities, but all actors in the criminal process see decisions of the judicial authorities of other Member States as equivalent to their own. As the European Council advocates, *"Mutual trust between authorities and services in the different Member States and decision-makers is the basis for efficient cooperation in this area. Ensuring trust and finding new ways to increase reliance on, and mutual understanding between, the different legal systems in the Member States will thus be one of the main challenges for the future".*[7]

Eurojust was created in this spirit. Eurojust is based in The Hague and consists of 28 National Members who are prosecutors, judges or police officers of equivalent competence. National Members are appointed by each Member State to carry out Eurojust's mandate. By providing a common roof for all 28 EU national prosecution authorities, enabling them to have daily contact, and by supporting and strengthening coordination and cooperation

[7] Stockholm Programme, p. 5.

between the national investigation and prosecution authorities of the Member States, Eurojust fosters mutual trust.

If established, the EPPO 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.

2. The current system of the protection of the EU's financial interests

Protection of the financial interests of the EU today is mainly provided for by the OLAF Regulation, the Eurojust Decision and by national legislation. In a nutshell, OLAF carries out administrative investigations on fraud, corruption and any other illegal activities adversely affecting the Community's financial interests, and submits the results to national authorities. The judicial follow up of these cases is then ensured by national authorities who may request the assistance of Eurojust.

Against this background, Eurojust appears as a key player in the fight against PIF crimes, as it is the only judicial body in the European Union ensuring coordination and cooperation between the competent authorities of the Member States in cases that fall within its competence. Eurojust deals with the resolution of problems in serious cross-border crimes by coordinating investigations and prosecutions, assisting national authorities with the application of judicial cooperation instruments (e.g. European Arrest Warrants, mutual legal assistance requests) and developing cooperation with third States. Eurojust works closely with the national authorities through the Eurojust National Coordination System. In addition, the unique position of Eurojust National Members as national prosecutors has enabled Eurojust to establish efficient bridges between the national authorities of the Member States.

Due to Eurojust's intervention, typical obstacles to judicial cooperation, such as the differences between legal systems and traditions or procedures and definitions of crime, can often be overcome. Through its National Members, Eurojust provides expertise in relation to issues such as differing rules on the admissibility and disclosure of evidence leading to successful admission of evidence at national trials. Eurojust also has in-depth knowledge in the field of prevention and resolution of conflicts of jurisdiction and has proven to be of great assistance to competent national authorities in relation to the question of which jurisdiction should prosecute in those cross-border cases where there is a possibility of a prosecution being launched in two or more jurisdictions.

3. The establishment of an EPPO: from a horizontal to a vertical set-up

The centralisation of the investigation and prosecution of PIF crimes conveyed by the wording of Article 86 TFEU suggests that an EPPO would have a vertical structure. This shift from national investigations and prosecutions based on horizontal judicial cooperation to the centralization of investigations and prosecutions at the EU level is certainly complex.

Adequate means have to accompany this shift to ensure that real added value is brought to the fight against crimes adversely affecting the EU's financial interests and that such increased effectiveness does not lead to loopholes in terms of the protection of fundamental rights.

II. Overview of the European Commission's Proposal on the EPPO

1. The aim of the Proposal

The first crucial point that needs to be kept in mind when assessing the European Commission's Proposal establishing an EPPO is that the goal of this initiative is not to create a novel actor but to more effectively fight against crimes adversely affecting the EU's financial interests.

Thus, a future EPPO should not be conceived as an isolated actor, but rather as part of a multi-level interaction. To bring added value, an EPPO needs to be fit for purpose. In this time of economic crisis, due consideration also needs to be given to the responsible use of resources.

2. A model well-integrated in the national systems

Although an EPPO is meant to have a vertical design, it needs to be ensured that both European and domestic interests would be adequately reflected in decisions taken by an EPPO concerning investigations and prosecutions conducted in Member States.

The European Commission's Proposal sets out an indivisible and hierarchical structure for an EPPO. In this design, an EPPO is headed by a European Public Prosecutor, assisted by four deputies. This specialised core group at EU level would direct and supervise the activities carried out by the European Delegated Prosecutors in each Member State. The structure created by the European Commission's Proposal relies mainly on these European

Delegated Prosecutors who can, under the authority of the European Public Prosecutor, undertake investigative measures on their own or instruct the competent law enforcement authorities to do so.

Nonetheless, the European Commission's Proposal does not clarify concretely how relations among European Delegated Prosecutors would take place and whether the European Public Prosecutor and the European Delegated Prosecutors would meet in a common structure to take decisions. Despite the vertical set up provided for the EPPO, this European body will face in its operations the same boundaries that horizontal cooperation faces today. Each European Delegated Prosecutor will act each within his/her own Member State and will need effective means to communicate across Europe. As Eurojust's experience demonstrates, this matter is not purely administrative; it has an important operational impact. The vertical set up of an EPPO must complement and build on the collegial and horizontal manner in which Eurojust works with the national authorities in Member States. In this context, the use of the Eurojust National Coordination System for the European Delegated Prosecutors would appear to be a logical conclusion.

3. Scope of competences of the EPPO

If a specialized actor is established to investigate and prosecute a certain criminality, it is vital that there is a common understanding of its scope of competences in all Member States. Such common understanding is needed both in regard to efficiency and the principle of legal certainty.

Article 86§1 TFEU indicates a first and main competence of an EPPO in "crimes affecting the financial interests of the Union". The Proposal reiterates the competence of an EPPO in *crimes affecting the financial interests of the Union*. However, when it comes to the definition of this competence, Article 2 of the Proposal refers to the proposed Directive on the fight against fraud to the Union's financial interests by means of criminal law *as implemented by national law.* It would be problematic to create an EPPO whose competences would be defined by different implementing laws at national level. Indeed, as some academics have highlighted, such differences in the definition of PIF crimes in national legislation would lead to an EPPO with a scope of competences *à géométrie variable.*

4. Applicable law to EPPO's activities

If an EPPO is established, this EU body would carry out investigations within the Member States and bring the cases to trial in national courts. It is consequently of great importance to define the law that would be applicable in this context.

The Proposal stipulates the principle that the investigations and prosecutions of the EPPO shall be governed by the Regulation; in other words, by European law.[8] However, the Proposal often refers to national law when it comes to regulating the EPPO's actions. Additionally, the Proposal states that, for all the matters not regulated by the Regulation, national law shall apply. Consequently, if an EPPO is established, national law will govern its actions to a great extent. Therefore, clear criteria to determine the law of which Member State should be applied needs to be defined. The Proposal specifies that the "*applicable national law shall be the law where investigation or prosecution is conducted."* Is this criterion self-explanatory, particularly in cross-border cases?

5. Collection and admissibility of evidence

Collection of evidence

In cross-border cases, even if investigations are conducted in one Member State, evidence needs to be collected in several Member States. Judicial cooperation in criminal matters currently relies on the Mutual Legal Assistance (MLA) system established by the 1959 and 2000 European Conventions on Mutual Assistance in Criminal Matters. The MLA system presents the crucial advantage of enabling requesting authorities to ensure that established formalities and procedures will be complied with by the requested authorities undertaking the investigative measures. This formalism is of great use during the trial phase because it provides greater transparency and legal grounds for the evidence obtained. Furthermore, the 2000 Convention gives to the competent authorities of two or more Member States of the European Union the possibility to set up a joint investigation team (JIT) by mutual agreement. The setting up of a JIT enables the competent national authorities to share information and to directly request investigative measures between team members, dispensing with the need for formal requests. The legal requirements to operate in the form of a JIT ensure that team members work together effectively with clear legal authority and certainty about the rights, duties and obligations of participants. In this MLA system,

[8] Article 11§3 of the Proposal on the establishment of the European Public Prosecutor's Office.

Eurojust plays a key role by assisting national authorities to significantly speed-up the execution of MLA requests and the setting-up of JITs.

When addressing the conduct of investigations in cross-border cases, the European Commission's Proposal establishing an EPPO refers to the possibility for the European Public Prosecutor to set up *joint teams* and to *instruct any EDP to undertake specific investigative measures on his/her behalf.*[9] The proposal doesn't specify what is to be understood by *joint teams*. Is the Proposal creating a new tool? If so, how would the formalities and procedures necessary for the collected evidence to be admissible in another Member State be ensured? Do we run the risk, even if limited by other factors, of investigation shopping by the EPPO?
Further clarification of this aspect is needed. The experience Eurojust has developed in this field could be valuable.

Admissibility of evidence
The establishment of an EPPO, specifically centralizing investigations and prosecutions in an area still characterized by a variety of procedural rules, raises many issues, notably regarding the admissibility of evidence in cross-border cases.

When it comes to the issue of admissibility of evidence, the European Commission's Proposal relies on the principle of mutual recognition. The draft regulation on an EPPO indeed specifies that the evidence presented by the EPPO to the trial court *shall be admitted in the trial without any validation or similar legal process even if the national law of the Member State where the court is located provides for different rules on the collection or presentation of such evidence.*[10] Each Member State defines the conditions under which evidence obtained from another Member State can eventually be used in court. Nevertheless, if the EPPO is established, the only verification that the trial court is called upon to carry regarding the evidence presented by the EPPO to the trial court is the compatibility of the collected evidence with Articles 47 and 48 of the Charter of Fundamental Rights of the EU (fairness of the procedure or the rights of the defence). Building the admissibility of evidence upon the principle of mutual recognition certainly has a noble ambition. However, it needs to be ensured that the use of this principle does not result in the transformation of the minimum protection provided for by the Charter into maximum protection.

[9] Article 18§3 of the Proposal on the establishment of the European Public Prosecutor's Office.
[10] Article 30 of the Proposal on the establishment of the European Public Prosecutor's Office.

6. Choice of forum

The European Commission's Proposal[11] leaves the choice of *forum* to the European Public Prosecutor in consultation with the European Delegated Prosecutor submitting the case. The Proposal enumerates some criteria that should be taken into account by the European Public Prosecutor when taking such decision. However, no order of priority is provided for in the draft regulation. This might represent a step back in comparison with the European Model Rules for the Procedure of the future EPPO (Model Rules)[12] which specify that the criteria of choice of forum shall be taken into consideration by the EPPO *in a certain sequence*. Is this ample discretion left to the EPPO as regards the choice of *forum* compatible with fundamental rights?

Given the experience and expertise Eurojust has gained in the field of prevention and resolution of conflicts of jurisdiction over the past eleven years, the role it could play in this field could be explored.

7. Judicial review

As Article 86 TFEU specifies, the Regulation establishing an EPPO shall also determine the rules applicable to the judicial review of procedural measures taken by an EPPO in the performance of its functions. The European Commission's Explanatory Memorandum rightly points out that the EPPO's operations should be governed by the principle of procedural neutrality and should be subject to judicial review.

Scope of the review

Against this background, the question arises of whether all decisions taken by the EPPO should be subject to judicial review. Does the fact that the Proposal does not explicitly discuss this (e.g. the EPPO decision to initiate an investigation or not, to prosecute or not, or to choose the forum) suggest that some of the European Public Prosecutor's decisions could not be challenged?

Competent judicial authority to carry-out the judicial review of EPPO's activities

When it comes to determining which court has competence for such review, the Proposal specifies that an EPPO *shall be considered as a national authority for the purpose of judicial*

[11] Article 27 § 4 of the Proposal on the establishment of the European Public Prosecutor's Office

[12] See Rule 64 of the Model Rules drafted by a project research carried-out at the University of Luxembourg in the period February 2010 – March 2012; http://www.eppo-project.eu/.

review.[13] However, as it transpired in the discussions of the Consultative Forum of Prosecutors General and Directors of Public Prosecutions of the Member States of the European Union, the judicial review of EPPO activities should not be an exclusive European or national matter. Even if an EPPO were to carry out the same activities as national prosecutors – investigating a case and bringing it to judgment - it would remain a European body and the rules governing these activities would be both national and European.

The burden thus put on national courts by this creative construction of the Proposal might create some concerns. National courts will not easily carry out such judicial review and will certainly need to refer to the European Court of Justice for preliminary rulings.

8. Relations EPPO – Eurojust

Although the exact meaning of the wording of Article 86 TFEU, which asserts that an EPPO should be established "*from Eurojust*", remains to be defined; the prominent role that Eurojust is being called upon to play in the context of the European Public Prosecutor's Office is quite clear. The efficiency expected from the centralization of investigations and prosecutions on PIF crimes arising from the creation of an EPPO would certainly be undermined by a lack of synergy between all involved actors.

Both effectiveness and cost-efficiency would be ensured by the setting-up of an infrastructure that ensures close ties with Eurojust. In addition, the European Public Prosecutor's Office can certainly profit from Eurojust's expertise and operational experience in international judicial cooperation and the tools it has developed. These tools include: information gathered by Eurojust, coordination meetings and operational coordination centres set up at Eurojust, the assistance of Eurojust in joint investigation teams, Eurojust's working relationships with partners and third States, and its close interaction with national authorities in Member States, will certainly contribute to the success of a future European Public Prosecutor's Office. To be successful, an EPPO should take advantage of the expertise and experience developed by Eurojust over the past eleven years of judicial cooperation and coordination.

[13] Article 36 of the Proposal on the establishment of the European Public Prosecutor's Office.

Conclusion

In conclusion, as the Stockholm Programme highlights: "*It is of paramount importance that law enforcement measures, on the one hand, and measures to safeguard individual rights, the rule of law and international protection rules, on the other, go hand in hand in the same direction and are mutually reinforced*". If an EPPO sees the light of the day, as an EU body within the area of freedom security and justice it needs to comply with the guiding principles of this area, namely contributing to security by effective crime control and with respect for the protection of fundamental rights. To meet this double objective, the proposal establishing an EPPO needs to gain clarity. Ambiguities in the legal framework could result in ambiguities in the protection of fundamental rights, and this must be avoided.

As the wording of article 86 TFEU (*from Eurojust*) suggests, Eurojust is called upon to play a prominent role in properly linking this Proposal that introduces a new actor in the landscape of criminal police and judicial cooperation to the current system of police and judicial cooperation. The EPPO can certainly profit from Eurojust's expertise and operational experience in international judicial cooperation and the tools it has developed. These tools would enable the EPPO to carry out its activities more efficiently as well as to overcome difficulties with consequences for the protection of fundamental rights (e.g. forum and investigation shopping).

What we need is an effective, well-balanced and fair system to improve the combating of "PIF" crimes by an EPPO while ensuring the respect of fundamental rights of persons under investigation, suspects, accused and convicted persons. I am confident we are moving in the right direction.

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