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# *The Proposed European Public Prosecutor's Office – from a Trojan Horse to a White Elephant?*

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**Abstract**
The concept of a European prosecution service operating within a single legal area as proposed by the 1997 *Corpus Juris* study aimed to tackle impediments to the prosecution of budgetary fraud cases in the transnational context. Subsequent compromises shifted the focus of negotiations from creating a European prosecution service with uniform powers to the integration thereof into the divergent national legal systems. This paper analyses relevant documents up to the draft endorsed by the 2015 Luxembourg Presidency and concludes that the scene is set for autonomous and binding Union decisions to prosecute budgetary fraud at national level. Nonetheless, the low-level of Europeanisation coupled with an increasingly complex model and no real scheme to tackle the fragmentation of national criminal laws fail to enable effective and consistent prosecutions of EU budgetary fraud.

**Keywords:** European Union, EU criminal law, Corpus Juris, European Public Prosecutor's Office (EPPO), *Taricco* judgment, PIF Directive

## I. INTRODUCTION

In 1997 the *Corpus Juris* study proposed the creation of a single legal area and the establishment of a European prosecution service in order to tackle the impediments to the prosecution of transnational fraud cases arising from substantive disparities among national criminal justice systems and the reluctance of Member States to initiate prosecutions. The most radical idea contained within the *Corpus Juris* study was the criminalisation and sanctioning of certain behaviours at the Union level and the conferral of prosecutorial powers – an attribute of national sovereignty – to a Union body. Thus, the emphasis was set on unification instead of harmonisation. Given the slow integration in the area at that time, the idea of unification seemed to have gone more than just one step too far, while the scheme of a European

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prosecution service has been regarded as a Trojan horse to create a single European criminal justice system.[1]

Over the years, the Member States – though reluctant to accept the idea of a single legal area – have recognised the practical necessity of having to deal with the issues at Union level. Horizontal models and approaches were introduced, such as the European Union's Judicial Cooperation Unit (Eurojust) or the principle of mutual recognition of judicial decisions. These measures aimed to improve cooperation in transnational cases, while keeping prosecutorial decisions under national authorities. At the same time, the European Commission pursued the idea of a European model of fighting budgetary fraud and put forward proposals on the institutional settings of a European Public Prosecutor's Office (EPPO) and on the range of offences it could prosecute. In the course of time, the reluctance of the Member States to confer specific prosecutorial powers on the Union shifted the focus of discussions from creating an independent Union body to the integration of the future EPPO into the national legal systems. This oddly led to the current situation where the original point of contention – the conferral of key prosecutorial decisions to Union level – enjoys broad conceptual support but the Member States seem reluctant to provide the office with identical powers.

In this paper, I question the added value of an EPPO with no uniform mandate or powers and with an increasingly complex institutional design. The paper concludes that the current state of negotiation enables autonomous and binding decisions at the Union level to prosecute budgetary fraud at national level. Nevertheless, the drafts fail to provide for the equality and consistency of future EPPO prosecutions and the increasingly complex central model might transform the EPPO into a white elephant with a lack of effective powers to tackle the fragmentation of the national criminal laws in this area.

## II. THE PROSECUTION OF TRANSNATIONAL BUDGETARY FRAUD

### *A. The characteristics and scale of fraud against the Union budget*

#### *1. The nature and forms of EU budgetary fraud*

The Council Decision on the system of the European Communities' own resources lays down the basic provisions for financing the EU budget.[2] At present, the EU income stream consists of three main elements. These are a share of the customs duties collected by the Member States (traditional own resources or TOR); a share of the value added tax (VAT) collected; and a direct contribution, calculated by each Member State's gross national income. A low percentage of the revenues so

[1] The results of the *Corpus Juris* Project under the direction of Mireille Delmas-Marty are presented in M Delmas-Marty, Corpus Juris *Introducing Penal Provisions for the Purpose of the Financial Interests of the European Union* (Editions Economica, 1997). For initial reactions to the study, see JR Spencer, 'Who's Afraid of the Big, Bad European Public Prosecutor?' (2012) 14 *Cambridge Yearbook of European Legal Studies* 364, pp 367–371.

[2] Council Decision (EC) No 436/2007 [2007] OJ L163/1.

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collected goes in Union administration, while the rest is distributed again to the Member States.[3] The two major headings of expenditure are agricultural subsidies together with structural and cohesion funds, with the Member States sharing the day-to-day management of around 80% of EU funds with the Commission.[4]

Fraudsters usually divert the EU funds by either evading payments of customs duties and taxes or by obtaining benefits to which they are not entitled. The typical forms of fraud on the income side are smuggling and transit fraud, while on the payment side refunds are falsely obtained without having exported anything. More often than not funds get diverted on both sides of the budget. In the case of the fraudulent legal arrangement of a VAT-*carousel* (or missing trader fraud), both the export refund is claimed and customs duties are evaded by a scheme in which goods get exported and then imported (or smuggled) back to the Union across a network of dummy companies. In addition, fraud is also frequently committed by bribery or intimidation of officials. The offences against the Union's financial interests bear increasingly transnational characteristics by involving activities carried out by a group of people, acting in an organised manner and operating across national borders.[5]

## 2. *The scale of EU budgetary fraud*

It is highly difficult to quantify fraud committed against the Union's financial interests. The Commissions' Annual Reports on the fight against fraud give an overview of the anti-fraud measures taken by the Commission and by the Member States as well as the results of these undertakings.[6] The figures however require careful consideration. The detection of fraudulent irregularities falls largely under the responsibility of the Member States. Their ability and willingness to detect and to report the cases significantly affect the annual figures. Also, as national authorities tend to focus on cases, which directly affect national financial interests, the vast majority of the reported cases relate to customs fraud and tax evasions.[7] On the basis of the figures compiled in this way, the annual reports of the Commission

[3] See Spencer, note 1 above, p 364. See the budget explained at the website of the European Commission: http://ec.europa.eu/budget/explained/index_en.cfm [last accessed 21 March 2016].

[4] *The OLAF Report 2013: Fourteenth report of the European Anti-Fraud Office, 1 January to 31 December 2013* (Publications Office of the European Union, 2014), doi:10.2784/29176, p 14.

[5] For a more detailed account, see JR Spencer 'The Corpus Juris Project and the Fight against Budgetary Fraud' (1998) 1 *Cambridge Yearbook of European Legal Studies* 77. For a brief overview on VAT, VAT gap and VAT fraud in the context of the EU budget see also House of Lords, *European Union Committee - Twelfth Report: The Fight Against Fraud on the EU's Finances*, HL Paper 158, paras 48–57 http://www.publications.parliament.uk/pa/ld201213/ldselect/ldeucom/158/15802.htm.

[6] The annual reports analyse the figures concerning the previous calendar year. They are prepared in cooperation with the Member States under Article 325 TFEU.

[7] See A Weyembergh et al, *The Inter-Agency Cooperation and Future Architecture of the EU Criminal Justice and Law Enforcement Area* (Policy Department C, 2014), p 34. http://www.europarl.europa.eu/RegData/etudes/STUD/2014/510000/IPOL_STU(2014)510000_EN.pdf (2014).

differentiate between fraudulent and non-fraudulent, as well as between reported and detected irregularities. The number of irregularities reported as fraudulent and the related amounts are, therefore, no direct measures of the level of actual fraud affecting the EU budget as a whole. Additionally, as the decision to open criminal proceedings remains in the competence of the national authorities, the numbers in the report tend to indicate the results in detecting cases of potential fraud.[8] In the light of the above considerations, the reported irregularities (both fraudulent and non-fraudulent) in 2013 involved an overall amount of about EUR 2.14 billion, of which EUR 1.76 billion concerned the expenditure sectors.[9] In 2014 the reported irregularities increased by 48% compared to 2013, and involved an overall amount of about EUR 3.24 billion, of which EUR 2.27 billion concerned the expenditure sectors. The detected irregularities represented 1.8% of payments on the expenditure side, and 4.46% of gross total TOR collected. The number of reported irregularities increased by 9% between 2010 and 2014, with the related amounts increasing by 80% in the period.[10] However difficult it may be to determine the precise scale of budgetary fraud, the reports showcase a significant level to face.

At Union level OLAF, the Union's Anti-Fraud Office, has the mandate for administrative investigations into fraud and corruption and to investigate serious misconduct by EU staff. OLAF investigations result in recommendations. These may seek the recovery of misused funds (financial recommendations), ask national authorities to consider judicial actions (judicial recommendations) or Union institutions to consider disciplinary action against their staff, or identify weaknesses in administrative procedures (disciplinary recommendations). The latest, fifteenth, operational report of OLAF covers the figures for the year 2014. It points out that when the figures from 2013 and 2014 are compared, a record number of 397 OLAF recommendations were issued in 2014, but indictment rates remained at the very same level.[11] In fact, one of the recurring arguments for the establishment of the EPPO, is the lack of action taken at a national level following the judicial recommendations of OLAF.[12]

These figures however require careful consideration. OLAF has no power to settle whether an irregularity is a criminal offence, and its recommendations do not bind the national authorities or have evidentiary value in national proceedings.[13]

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[8] COM (2015) 386 final, p 19.

[9] For the first time ever, most of the reported fraudulent irregularities (60%) were detected in the agricultural sector, with the largest share of amounts that involve irregularities (63%) still concerning cohesion policy. COM (2014) 474 final, p 13.

[10] See note 8 above.

[11] *The OLAF Report 2014: Fifteenth report of the European Anti-Fraud Office, 1 January to 31 December 2014* (Publications Office of the European Union, 2015), doi:10.2784/17178, p 23.

[12] See note 4 above, p 22.

[13] In 2014, OLAF analysed for the first time the arguments given to 16 of its recommendations, to look at why national authorities decided not to pursue them. Currently this analysis is only available for internal use within the Office. See note 11 above, p 23.

If national authorities follow up OLAF's recommendations, they first decide whether the irregularity is relevant to criminal law at all and if yes, whether to initiate criminal proceedings. Once a case is taken up, it may still be dismissed or it may eventually lead to an indictment. Hence, low indictment rates are far from being a direct measure of the follow up of OLAF investigations in general.

### *B. Impediments to prosecution of budgetary fraud in a transnational context*

The predominantly transnational characteristic of budgetary fraud often results in multiple jurisdictions being linked to the same case.[14] A number of inter-connected reasons have, however, long hindered successful prosecution of EU budgetary fraud in the transnational context. First, the traditionally strong asymmetry of the legal systems with regard to the prosecution policies led to mandatory prosecution of EU budgetary fraud in one Member State and the decline of prosecution on grounds of discretionary reasons in another.[15] Second, the differences in the substantive criminal laws, such as the location of the applicable rules, the definitions, sanctioning and time limitations of the relevant offences or issues of negligence and corporate liability.[16] Third, the differences in the criminal procedure laws concerning the investigative powers, the use of coercive powers and the admissibility of illegally obtained evidence.[17] Finally, the different systems provide for different levels of protection of the rights of those concerned by the procedure.

Beside the disparities of the criminal law systems, judicial cooperation was also hindered by restrictive national rules usually requiring the offence to be linked in some way to the state concerned and forbidding the extradition of a State's own nationals for the purpose of criminal investigations.[18] In reality, even when it came to investigating transnational fraud, this often resulted in lengthy and highly complex procedures by requesting judicial assistance from foreign national authorities with no efficient network of contacts.[19]

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[14] See Delmas-Marty, note 1 above, p 12.; see Spencer, note 5 above, p 78. See also COM (2011) 293 final.

[15] See Spencer, note 5 above, p 80. For comparative studies undertaken since the *Corpus Juris* Project see the analyses of certain aspects of criminal procedure in the 'European criminal procedures' study conducted by Delmas-Marty and Spencer, or the ongoing project on 'National Criminal Law in a Comparative Legal Context' by Sieber at the Max-Planck Institute. The *fiches belges* of the European Judicial Network provides for a further important database. Highly valuable data has been gathered and presented in a study conducted by Ligeti, based on a comparative analysis of 27 national reports covering general aspects of criminal procedure, the attribution of investigative and prosecutorial powers, and the associated procedural safeguards of the Member States of the Union. See M Delmas-Marty and JR Spencer (eds), *European Criminal Procedures* (Cambridge University Press, 2002); U Sieber et al (eds), *National Criminal Law in a Comparative Legal Context* (Duncker & Humblot, 2011); K Ligeti (ed), *Toward a Prosecutor for the European Union*, vol 1. (Hart Publishing, 2013).

[16] See Spencer, note 5 above, pp 79–80.

[17] See Delmas-Marty, note 1 above, p 140.

[18] Ibid, pp 26, 28 and Spencer, note 5 above, pp 79–81.

[19] See Spencer, note 5 above, pp 81–82. This even limited the requests for mutual legal assistance in complex procedures.

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Further problems concerned the trial phase and the admissibility of evidence produced under foreign jurisdiction. The different investigative powers of the national prosecution services together with the divergent procedural safeguards led to situations where evidence of value in one country was refused as illegally obtained evidence in another.[20] Finally, the principle of judicial control was enforced in varied ways in the different legal systems.[21]

### *C. First steps to fight budgetary fraud at Union level*

When the Community's general budget secured its own resources in 1971, it marked a significant change from the former system based on the contributions of the Member States. The considerable differences in the legal framework of the protection of its financial interests at national level called for new arrangements at Union level.

First, the Court of Justice ruled in the 'Greek maize judgment' that the Member States have to take effective measures analogous to those applicable to infringements of national law to stop fraud against the EU budget.[22] The rules of effective and equivalent protection became primary law in the form of Article 280 of the EC Treaty, requiring Member States to take the same measures to counter Community fraud as if it affected their national budget. The provision also empowered the Council to co-ordinate the fight against budgetary fraud. In practice however it has been often difficult to persuade the national authorities to acknowledge the principle of equivalent protection of the Union budget.[23]

Later, as the EU budgetary system is funded mostly by the Union's own resources, its criminal law protection was increasingly recognised as a fundamental Union interest.[24] The current framework dates back to 1995, when the Member States adopted the Convention on the protection of the European Communities' financial interests (hereinafter PIF Convention).[25] The PIF Convention was designed to create uniform definitions and penalties across the Union for offences against the financial interests of the Union. Besides Croatia and the UK, it obliges all Member States to impose criminal sanctions for serious cases of fraud against the EU budget.[26]

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[20] JR Spencer, 'The Concept of "European Evidence"' (2003) 4 (2) *ERA Forum* 29, pp 34–35.

[21] See Delmas-Marty, note 1 above, p 80.

[22] In any event the penalties have to be effective, proportionate and dissuasive and the national authorities must proceed, with respect to infringements of Community law, with the same diligence as that which they bring to bear in implementing corresponding national laws. *Commission v Hellenic Republic*, 'Failure of a Member State to fulfil its obligations' C-68/88, EU:C:1989:339.

[23] See Spencer, note 5 above, p 81. Article 280 TEC now forms Article 325 TFEU, obliging Member States to counter fraud and other illegal activities against the Union's financial interests in an effective and deterrent manner by taking equal measures, as if it affected their own financial interests.

[24] See Delmas-Marty, note 1 above, p 12.

[25] Council Act [1995] OJ C316/48. The acronym 'PIF' is the abbreviation of the French phrase for *Protéger les intérêts financiers de l'Union européenne*.

[26] The UK was initially a party but opted out in line with Protocol 22 as from 1 December 2014. Contrastingly, the Commission recently proposed the accession of Croatia to the PIF Convention. See, COM (2015) 458-2015/0210 (NLE). See also S Peers, 'The Italian Job: The CJEU strengthens criminal

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The material scope of the Convention was subject to ongoing debates, most notably whether it covers VAT fraud.

The first measures introduced at Union level turned out to be less effective than desired. Article 280 EC Treaty failed to provide for enforcement mechanisms in case a Member State disregards its obligation for equivalent protection. It also limited the Councils leeway, as its coordination measures should have 'not concern the application of national criminal law or the national administration of justice'.[27] The PIF Convention was adopted under the intergovernmental mechanisms of the third pillar of the Maastricht Treaty, which required the Convention to be ratified by all Member States and its provisions to be implemented into national law. The ratification proved to be a lengthy process and it was implemented into national laws with varying results.[28] Altogether, the strong disparity of the legal systems and the Union's inconsistent attempts to deal with the situation partly led to an unjust, incoherent and ineffective system of fighting EU budgetary fraud.[29]

## III. THE *CORPUS JURIS* STUDY AND ITS IMPACT

### A. *The* Corpus Juris *study*

#### 1. *The scheme of a single legal area based on standardised rules*

In 1995, dissatisfied with the above state of affairs, the European Commission's Directorate-General of Financial Control launched the European Legal Area Project (*Espace judiciare européen)*. The task was to invent a scheme that would solve the problem of tackling budgetary fraud, given that there would be a legal basis and political will to implement it.[30] The results were published in 1997 as '*Corpus Juris*: Introducing Penal Provisions for the Purpose of the Financial Interests of the European Union'.[31]

In broad terms, the *Corpus Juris* envisaged a single European legal area whenever it comes to the criminal law protection of the Union's financial interests. Given the significantly diverging national rules, the proposal defined a single set of criminal offences (a unified definition of fraud and other specific offences) accompanied by principal and additional penalties and presented a common set of rules of criminal

*(F'note continued)*
law protection of the EU's finances' (*EU Law Analysis*, 22 September 2015) http://eulawanalysis.blogspot.co.at and Spencer, note 5 above, p 81.

[27] Current Article 325 (4) TFEU, which replaced the former Article 280 (4) EC has scrapped the former wording.

[28] The PIF Convention came into force in 2002 and was fully implemented by only five Member States. See COM (2011) 293 final. For a fuller account, see note 11 above; Spencer, note 5 above, p 82.

[29] See Delmas-Marty, note 1 above, p 14. See also COM (2011) 293 final.

[30] See Delmas-Marty and Spencer, note 15 above, p 62; Spencer, note 5 above, pp 83–84; F de Angelis, 'L'espace judiciaire pénal européen: une vision se concrétise' (2012) (2), *eucrim* 75.

[31] The study group worked under the direction of French criminal lawyer Professor Mireille Delmas-Marty; see note 1 above.

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procedure and evidence in trans-border cases.[32] The combined territory of the Union was envisaged as the territorial base for these offences, aiming to dissolve problematic issues arising from the criminal law principle of territoriality.[33]

### 2. *The concept of a centralised European prosecution service*

In order to secure the uniform application of the rules, the *Corpus Juris* study proposed the creation of a supranational body, the European Public Prosecutor (EPP), with authority to investigate and prosecute the related crimes throughout the Union.[34] The idea of transferring the decision to prosecute budgetary fraud to the Union level aimed to overcome the inconsistency of prosecutions at national level by ensuring a coherent policy, based on the standardised rules.[35]

The *Corpus Juris* study envisaged a centralised model: an indivisible and independent Union body that investigates, prosecutes and tries the applicable offences as well as supervises the execution of the sentences. It was to comprise the European Director of Public Prosecution (EDPP) at Union level and the European Delegated Public Prosecutors (EDelPP) seconded from and based in their respective Member States. The idea was to enable the EDelPPs to use both their new European and their old national networks.[36] The proposal conferred a set of investigative powers on the EPP (including search and seizure, telephone tapping, questioning of suspects) in order to ensure identical ways of evidence gathering throughout the Union. To avoid lengthy extradition procedures between Member States, the EPP might have also requested for a 'European warrant for arrest', which, once granted by a court, would have been valid across the Union. As a main rule, the study envisaged mandatory prosecution, once solid evidence existed that one of the offences had been committed. The settlement of less serious fraud cases would have been possible after the payment of an extra sum of money.[37]

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[32] See Delmas-Marty, note 1 above, pp 44–48.

[33] See Delmas-Marty and Spencer, note 15 above, p 62. See also G Dona, 'Towards a European Judicial Area? A Corpus Juris Introducing Penal Provisions for the Purpose of the Protection of the Financial Interests of the European Union', (1998) 6 *European Journal of Crime, Criminal Law and Criminal Justice* 282.

[34] The EPP was first proposed in 1996 by Klaus Hänsch, former President of the European Parliament. See 'Ten concrete proposals to step up the fight against fraud' presented by President Klaus Hänsch at the Interparliamentary Conference, Brussels 23 and 24 April 1996. See Delmas-Marty, note 1 above, p 84. Though the authors emphasised that setting up the EPP is not the only solution, they were convinced that it might be the best one to ensure consistent prosecution policy in a single legal area. See Spencer, note 5 above, p 86.

[35] The idea of a European public prosecutor emerged first in the context of EU budgetary fraud mainly committed by officials of the Community and within the European Institutions. See Delmas-Marty, note 1 above, p 84.

[36] See Spencer, note 5 above, p 86.

[37] Besides the payment of an extra sum of money the suspect would have been required to make amends for the damage or have returned the funds illegally received. See Delmas-Marty, note 1 above, p 88.

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### 3. *The trial phase and judicial control*

In order to ensure the continuity of proceedings and a certain degree of equality amongst those being tried, the EPP together with the national prosecutors would have presented the case in front of the national courts and in accordance with national law.[38] To address the strong disparities concerning the composition of the courts at national level, the proposal required the trial courts to consist of professional judges specialised in economic and financial matters whenever possible.[39,40] The final judgments of the national courts would have been valid across the Union.[41]

As regards the judicial control of EPP activities, the 'judges of freedoms', appointed by each Member State, would have controlled EPP actions in the preparatory stage, including the ex-ante authorisation of coercive measures.[42] The national courts would have ruled on appeals against conviction or acquittal,[43] while the European Court of Justice would have ruled in disputes concerning the *Corpus Juris* and with regard to conflicts of jurisdiction.[44]

### 4. *The innovative aspects of the* Corpus Juris *and its impact on EU criminal law*

In search of a more radical solution in the criminal law protection of the Union's financial interests, the *Corpus*-scheme shifted the emphasis from assimilation and harmonisation to the unification of the relevant rules. The idea was to establish a single legal area based on unified definitions, standardised procedures, common principles and defence rights that would apply irrespective of where the offence had been committed, investigated, prosecuted or tried. The unified regime of rules aimed both to assist investigations and to improve the position of the defendant. In addition the *Corpus Juris* proposed the establishment of a central prosecution service with Union wide mandate and investigative powers on the grounds of the standardised rules.

Although the Member States initially resisted the idea of the EPP, some concepts in the *Corpus Juris* study had significant impact on EU criminal law. The idea of a 'European warrant for arrest' was introduced in the 2002 Framework Decision on the European Arrest Warrant (EAW), the first instrument based on the mutual recognition of judicial decisions.[45] Once it came into force in 2004, the EAW transformed extradition into speedy surrender procedures based on purely judicial decisions for a

[38] Ibid, p 96.

[39] Ibid, pp 116–118.

[40] Art 26 *Corpus Juris* proposal, see Delmas-Marty, note 1 above, p 170.

[41] Art 24 ibid, p 168.

[42] Art 25 ibid, p 168.

[43] Art 27 ibid, p 170.

[44] Art 28 ibid, p 172.

[45] Framework Decision 2002/584/JHA on the European Arrest Warrant and the surrender procedures between Member States [2002] L190/1. See also interviews with Christine Van Den Wyngaert and Viviane Reding in *Eurojust News* (issue 8, May 2013), pp 3–6 http://www.eurojust.europa.eu/doclibrary/corporate/Pages/newsletter.aspx

broader spectrum of offences, not only PIF related. The concept of Union-wide validity and enforceability of final judgments was later applied by various framework decisions, which required the mutual recognition of final decisions in criminal matters.[46] Nonetheless, the Union-wide validity in the *Corpus Juris* study was justified by the unified definitions and the standardised procedure rules. In contrast, the adopted framework decisions required the mutual recognition of final decisions not on grounds of similarity, but on mutual trust in diversity, ie on the Member States' presumed mutual trust in the legality and functioning of each other's differing legal systems.

Altogether, the impact of the *Corpus Juris* study on EU criminal law and EU integration is greater than just proposing a scheme to tackle EU budgetary fraud. It started the discussion on which Union interests require criminal law protection, on the role of criminal law in the integration process and the added value of EU criminal law legislation in general.

### B. *Reactions to the* Corpus Juris *study*

#### 1. *The reaction of the Member States: horizontal initiatives*

The reactions to the *Corpus Juris* study varied considerably. The Member States were not ready for a European prosecution service and supported horizontal approaches instead to strengthen judicial cooperation between the Member States. At institutional level this included (also as a counter-reaction to the vertical approach of a European prosecution service) the establishment of Eurojust, agreed in 1999 at the Tampere European Council. First, at the initiative of a number of Member States, Pro-Eurojust was set up in 2000 as a clearly intergovernmental body. Later in 2002 a Council Decision established Eurojust, outside the Community framework, within the third pillar.[47] The unit can be best described as a Union body with national arms and legs, as their respective governments finance the National Members at Eurojust and their powers are governed by national laws.[48] Its main task is to facilitate and coordinate the efforts of the national law-enforcement authorities when dealing with trans-border crimes, with regard to surrender of persons, gathering evidence and execution of sentences. Although its mandate covers multilateral PIF cases as well, it may only act upon request. Above all, Eurojust has no power to initiate criminal investigations.

#### 2. *The reaction of the Commission: follow-up studies*

The Commission on the other hand pursued the idea of fighting budgetary fraud with the assistance of a European prosecution service. Following the presentation of the report an additional study was conducted on the feasibility of the *Corpus Juris*.

[46] For an overview of the relevant measures see eg JR Spencer 'EU criminal law' in C Barnard, S Peers (eds), *European Union Law* (Oxford University Press, 2014), pp 772–774.

[47] 2002/187/JHA [2002] OJ L63/1.

[48] Article 9a (2) of 2009/426/JHA [2009] OJ L138/14. See also M Luchtman and J Vervaele 'European Agencies for Criminal Justice and Shared Enforcement (Eurojust and the European Public Prosecutor's Office)' (2014) 10 (5) *Utrecht Law Review* 132, p 134.

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The follow up study was published in 2000, containing detailed information on the criminal justice systems of the then 15 Member States.[49] Regarding the practicality of the *Corpus Juris* and how far its provisions could be integrated into the different legal systems of the Member States the study argued that the national legal systems became more compatible through a general decrease in the traditional contrast between the obligation and the discretion to prosecute.[50] The *Corpus Juris* 2000 amended and redrafted the original text, confirming basic concepts, such as the role of the 'judge of freedoms' in the preparatory stage[51] or the idea of a European Arrest Warrant.[52] The concept of 'European Territoriality' was introduced as a basic principle, which would have allowed investigations and prosecutions without recourse to instruments of mutual recognition and mutual legal assistance.[53] However, the new draft also watered down some of the original ideas, notably requiring the trial courts to consist of professional judges, specialised in economic and financial matters only as far as possible.[54]

With a view to deepening the debate and exploring the feasibility and possible mechanisms of an EPP, the Commission also issued a Green Paper in 2001.[55] In this, the declared objective of a common investigation and prosecution area was based on the principle of mutual recognition, enshrined in the 1999 Presidency Conclusions as the central principle at the heart of EU criminal law.[56] The Green Paper proposed a decentralised EPP with a mandate to cover the PIF offences.[57] As regards the powers of the EPP, the paper opted to leave the detailed rules with the national laws with a minimum level of harmonisation at Union level.[58] Refraining from the approximation of national criminal procedure laws preserved the existing practical problems concerning the recognition of foreign evidence and judicial cooperation, which originally generated the action at Union level.

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[49] M Delmas-Marty and JAE Vervaele (eds), *The Implementation of the Corpus Juris in the Member States*, (Intersentia, 2000), 4 vol. For the text of the *Corpus Juris* 2000 proposal, see https://www.jura.uni-augsburg.de/lehrende/professoren/schuhr/medienverzeichnis/Forschung/corpusjuris2000.pdf

[50] Ibid, pp 309–310.

[51] Arts 25bis–25quater, *Corpus Juris* 2000 proposal, ibid.

[52] Art 25ter ibid.

[53] See in greater detail J Vervaele, 'European Territoriality and Jurisdiction: the Protection of the EU's Financial Interests in Its Horizontal and Vertical (EPPO) Dimension', in M Luchtman (ed), *Choice of Forum in Cooperation Against EU Financial Crime – Freedom, Security and Justice & the Protection of Specific EU-Interests*, (Eleven International Publishing, 2013), pp 167–184.

[54] Art 26, *Corpus Juris* 2000 proposal, see note 49 above.

[55] Green Paper on the criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor. COM (2001) 715 final.

[56] Presidency Conclusions, Tampere European Council, 15 and 16 October 1999, paras 33–37 http://www.europarl.europa.eu/summits/tam_en.htm. See also C Fijnaut and M Groenhuijsen, 'A European Public Prosecutor Service: Comments on the Green Paper', (2002) (11) *European Journal of Crime, Criminal Law and Criminal Justice* 321. For a discussion of the extent to which the EU JHA policy has evolved over the years see S Peers,'EU Justice and Home Affairs Law (Non-Civil)' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, 2011), pp 269–298.

[57] See note 55 above, 5.2.

[58] Ibid, 5.1.

In 2003 the Commission published a follow-up report evaluating the results of the public consultation on the Green Paper.[59] One of the main concerns was related to the different level of procedural safeguards in the national laws, which was to be addressed in later documents.[60] The report emphasised once again that the task is not to set up a fully-fledged European system, but to facilitate the prosecution of the related offences.

### *C. Article 86 TFEU: legal basis for the European Public Prosecutor's Office*

The Treaty of Lisbon set a stronger basis for European integration in the criminal justice area by providing for the application of the 'community method' and offering new powers for the Court and the European Parliament. In this Treaty context, the fight against fraud[61] is part of the general objective to establish a high level of security for European citizens within the area of freedom, security and justice.[62] It shall be established amongst others by mutual recognition measures,[63] by the approximation of laws,[64] by reshaping the existing institutional settings[65] and by the creation of new European bodies.[66]

Accordingly, and following a first inclusion in the failed Constitutional Treaty,[67] the Lisbon Treaty finally laid the legal basis for the establishment of the EPPO in Article 86 TFEU, proving that the problems the *Corpus Juris* once intended to solve are still to be addressed.[68] According to Article 86 TFEU, the Council, by means of regulations, and in accordance with special legislative procedure, may establish the EPPO from Eurojust, in order to combat crimes affecting the financial interests of the Union. The Council shall act unanimously after obtaining the consent of the European Parliament, but the Office may be established by enhanced cooperation of at least nine Member States as well.[69]

The fact that the Treaty allowed for a smaller number of Member States to proceed with the idea in the absence of unanimity demonstrates both the uncertainty over how many Member States might participate in the EPPO adventure and the political will to establish the EPPO. The Office shall be responsible for the investigation, prosecution and bringing to judgment of the related offences. The short provision left it to the regulation to define basically all features of the EPPO. The most debated issues concerned the mandate and the powers of the EPPO, its institutional design,

[59] COM (2003) 128 final.

[60] Ibid, p 16.

[61] Art 310(6) TFEU and Art 325(4) TFEU.

[62] Art 3(2) TEU and Art 67(3) TFEU.

[63] Art 82 TFEU.

[64] Art 83 TFEU.

[65] Art 85 TFEU, on the strengthening of Eurojust.

[66] Art 86 TFEU, on the possible establishment of an EPPO.

[67] ART III-274.

[68] K Ligeti and M Simonato 'The European Public Prosecutor's Office: Towards a Truly European Prosecution Service?' (2013) 4 *New Journal of European Criminal Law* 7, p 21.

[69] Art 86(1) TFEU.

the applicable law for its actions, its relations to existing EU bodies in the area and to national authorities as well as the judicial control over its actions; in other words, issues as to the choice of the right levels of Europeanisation and reliance on national laws.[70]

## IV. COMMISSION PROPOSALS CONCERNING THE MANDATE AND INSTITUTIONAL DESIGN OF THE EPPO

### *A. The mandate of the EPPO*

#### *1. The PIF Directive: an open debate*

In July 2012 the Commission proposed a Directive on the fight against fraud to the Union's financial interests by means of criminal law (PIF Directive) to replace the PIF Convention.[71] It is essential to take a look at the proposal as it may provide for the mandate of the future EPPO. It shall remove the existing loopholes in the Member States' anti-fraud legislation by creating common minimum rules on defining criminal offences, sanctions and time limitations.[72] Just like the PIF Convention, the PIF Directive will need to be implemented into the national laws.

The major areas of contention concerned the legal basis of the Directive and whether it should cover VAT fraud. The Commission based the proposal on Article 325(4) TFEU (combatting fraud), which would mean that all Member States would be bound by the future Directive. The Legal Service of the Council did not share this view and argued that the correct legal basis was Article 83(2) TFEU (the approximation of criminal laws), which falls within the ambit of Protocols No 21 and No 22. The Legal Service stressed that even if it means that Denmark would be exempted and the UK and Ireland could refuse to join in, all three Member States would remain bound by the PIF Convention.[73] This argument, however, is not valid any more, as the UK opted out of the PIF Convention as of 1 December 2014.

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[70] After the legal basis had been set in the EU Treaty, the Commission conducted a study with regard to the investigative and prosecutorial powers of the EPPO in the pre-trial stage and the procedural safeguards and evidential standards governing his activities. The study group elaborated an exhaustive set of common investigative measures and laid down general principles of the EPPO's procedure and a set of defence rights. In the later drafts however the EU legislator opted against a minimum harmonisation of the rules of procedure and evidence. For a full account see Ligeti, note 15 above. See also K Ligeti, 'The European Public Prosecutor's Office: How Should the Rules Applicable to its Procedure be Determined?' (2011) (4) *European Criminal Law Review* 123; A Csúri, 'Naming and Shaping. The Changing Structure of Actors Involved in the Protection of EU Finances' (2012) 2 *eucrim* 79; M Zwiers, *The European Public Prosecutor's Office: Analysis of a Multilevel Criminal Justice System* (Intersentia, 2011); K Ligeti, 'The European Public Prosecutor's Office: Which Model?' in A Klip (ed), *Substantive Criminal Law of the European Union* (Maklu, 2011), p 51.

[71] Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law, COM (2012) 363 final.

[72] See note 8 above, p 4. For more detail see L Kuhl, 'The Initiative for a Directive on the Protection of the EU Financial Interests by Substantive Criminal Law' (2012) 2 *eucrim* 63.

[73] Opinion of the Legal Service 15309/12.

Once again, the exact scope of the Union's financial interests proved to be the Achilles heel of the negotiations, as the other contention concerned whether the Directive should cover VAT fraud. Although the Preamble underlined that the Directive covers VAT fraud as the financial interests of the Union include VAT revenues (Recital 4), the text itself mentioned neither VAT revenue nor VAT fraud.[74] On the Council's side, Article 2 of the general approach of the compromised text explicitly excluded VAT revenues from the scope of the Directive.[75] Finally, the European Parliament in its 2014 position labeled the inclusion of VAT evasion in the Directive as 'natural'.[76] Whether or not the Directive covers VAT fraud will have direct impact on the mandate (and on the workload) of the EPPO if it will be defined by reference to the PIF Directive.[77]

### 2. *The Court judgment in* Taricco

The 2015 Court decision in *Taricco*[78] could speed up the negotiations on the PIF Directive (and on the EPPO Regulation) with respect to VAT fraud. The decision represents a rather unexpected development in the Court's otherwise restricted approach to usher in integration in criminal matters.[79] The case concerned Italian legislation, with a question posed for a preliminary ruling on whether national rules on prescription periods, which hinder prosecutions of VAT fraud against the national budget, infringe EU law. The Court assumed that the question was more generally on EU law and expanded its interpretation to Article 325 TFEU and to the PIF Convention (§35).[80]

Previously the Court ruled in *Åklagaren* that it follows from the 2006 Directive on the common system of value added tax that all Member States are obliged to collect VAT revenue and to fight VAT evasion and that because parts of the national VAT revenue constitute the Union's budget, any lacuna in its collection potentially causes a reduction in the EU budget.[81] The same decision also emphasised that the Member States are free to choose the applicable penalties (administrative or criminal),

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[74] See note 71 above, 3.4: legal elements.

[75] Council (6 June 2013) DROIPEN 75 10729/13

[76] Report on the proposal for a directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interest by means of criminal law http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2014-0251+0+DOC+XML+V0//EN.

[77] See note 7 above, p 45.

[78] *Taricco* and others, C-105/14, EU:C:2015:555.

[79] On the different role of the Court in pushing legal integration within the single market and within Police and Judicial Cooperation in Criminal Matters see A Hinarejos, 'Integration in Criminal Matters and the Role of the Court of Justice' (2011) 36 *European Law Review* 420.

[80] See Peers, note 26 above.

[81] See *Åklagaren v Hans Åkerberg Fransson*, C-617/10, EU:C:2013:105, para 26. The Court confirmed its position in *Commission v Germany*, C-539/09, EU:C:2011:733, paras 34 and 72. See also Arts 2, 250(1) and 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ L347/1.

ensuring that VAT revenue is collected and the financial interests of the Union are protected.[82]

In *Taricco*, however, the Court went further and stated that criminal penalties may be essential to combat certain serious VAT evasions. This was supported by the argument that VAT fraud is covered by the PIF Convention, according to which fraud has as its effect the misappropriation or wrongful retention of funds from the general budget of the EU.[83] In addition, the Court emphasised that the Member States' obligation to counter illegal activities against the financial interests of the Union (including VAT fraud) is imposed by EU primary law and ruled that Article 325(1) and (2) TFEU, in accordance with the precedence of EU law in their relationship with national law, have the effect of rendering automatically inapplicable any conflicting national provisions (such as the effects of the limitation periods in the respective case). Therefore, national courts must ensure that the full effect of EU law is applied, even if this requires disregarding national criminal law provisions.[84]

### 3. *Evaluation: possible scenarios for the EPPO mandate*

The *Taricco* judgment extends EU criminal law obligations to VAT fraud on the basis of EU primary law.[85] The argument that the PIF Convention necessarily covers VAT fraud will possibly speed up the negotiations on the scope of the PIF Directive and on the mandate of the EPPO as well. In any case, there are still important questions, waiting to be answered in the negotiations. Which VAT fraud cases are to be considered serious and in what form will the Member States agree to include these offences in the PIF Directive? Would serious VAT fraud cases generally be under EPPO competence or only in a transnational context, such as carousel fraud?

Additionally, Ireland, the UK and Denmark will all be obliged under Article 325 TFEU, regardless of their positions to the PIF Convention or the PIF Directive, respectively. In the latter case, the Member States have the freedom to decide about the applicable form of penalty, but in the light of *Taricco* serious forms of VAT fraud will require the application of criminal penalties.[86]

With regard to the future EPPO's competence, if the European Parliament does not support the PIF Directive without the inclusion of VAT fraud, the EPPO's competence could be defined either by reference to the PIF Convention or in the EPPO Regulation itself. The first one would be a more dynamic but less efficient solution, as the implementing national laws will not provide for a uniform EPPO mandate. The lack of uniformity will not be solved by infringement proceedings of the Commission either. The second solution is more static, but would have the advantage that through the Regulation's direct effect, the scope of the EPPO's

[82] Ibid, *Åklagaren v Hans Åkerberg Fransson*, para 34.

[83] See note 78 above, para 41.

[84] Ibid, paras 50, 52 and 58.

[85] See Peers, note 26 above.

[86] Ibid.

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competence would be the same in all participating Member States. Altogether, the best way to provide the EPPO with uniform mandate across the Union would be to clarify the scope of its material competence in the EPPO Regulation.

### *B. The EPPO proposal: institutional design and operative powers*

In July 2013, the Commission put forward a proposed Regulation on the EPPO[87] – the institutional aspect of fighting fraud against the Union's financial interests – under Title V of the Treaty accompanied by a detailed Impact Assessment.[88] By reason of their special links to each other, a proposed Regulation on Eurojust,[89] and a Communication on OLAF's governance and the reinforcement of procedural safeguards in investigations were also presented.[90] The proposal set out as its main objective to establish a coherent European system for the investigation and prosecution of budgetary fraud in order to increase the insufficient numbers of prosecutions, convictions and recoveries at national level.

#### *1. The competence of the EPPO*

In line with Article 86(1) TFEU, the proposal limited the EPPO competence to PIF offences and defined it by reference to the future PIF Directive. Additionally, if certain criteria were met, the EPPO would have ancillary competence regarding inextricably linked other offences in service of good administration of justice.[91] The nature of its competence was to be exclusive, with national authorities only investigating and prosecuting the related cases if required so by the EPPO.[92]

#### *2. The lack of uniform powers*

The preamble labeled as essential the provision of the EPPO with a comprehensive set of investigative measures to ensure the effective investigation and prosecution of the relevant offences.[93] Depending on how one interprets comprehensiveness, Article 26 of the proposal indeed provided for a catalogue of investigative measures that should be available for EPPO investigations in all Member States. However, the detailed rules of the measures were left with the national laws, the fragmentation of

[87] Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM (2013) 534 final.

[88] Impact Assessment Accompanying the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, SWD(2013) 275 final.

[89] Proposal for a Directive of the European Parliament and of the Council, COM (2013) 535 final. See A Weyembergh, 'An Overall Analysis of the Proposal for a Regulation on Eurojust' (2013) 4 *eucrim* 127. See also A Weyembergh et al, 'Competition or Cooperation? State of Play and Future Perspectives on the Relations Between Europol, Eurojust and the European Judicial Network' (2015) (2) *New Journal of European Criminal Law* 258.

[90] COM (2013) 533.

[91] See note 87 above, Art 13.

[92] Ibid, Art 11.

[93] Ibid, Rec 28.

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which was cited in the preamble as a one of the reasons for insufficient investigations at national level and as a justification for the setting up of the EPPO.

As regards the rights of the defendant, the preamble and the rules on procedural safeguards refer to the Charter of Fundamental Rights of the European Union and to the harmonised procedural safeguards under Article 82 TFEU. Additionally the text provides for further guarantees, such as the rights to legal aid and to present evidence.[94]

### 3. *Rules on evidence and judicial control*

Not providing for identical investigative powers throughout the Union affected the rules on the admissibility of evidence gathered by the EPPO and the rules on the judicial review of its actions. Broadly speaking, the proposal declared the general admissibility of evidence produced in EPPO investigations, irrespective of different rules of gathering the given type of evidence under the trial states law.

The Proposal considered the EPPO as a national authority for the purpose of judicial review by reason of its investigations carried out according to national rules and being authorised by national courts.[95]

### 4. *A vertical model: decentralised enforcement of central decisions*

The proposed structure was much like the one advocated by the *Corpus Juris*. A central European unit consisting of the EPP and his/her Deputies would be responsible for taking decisions, supervision and a consistent prosecution policy. The EPP decides whether to dismiss or to bring a case before a national court (choosing the jurisdiction of trial). In case of dismissal, the case might be referred for administrative follow up to OLAF or to the competent national authorities. As an alternative to prosecution, the proposal provided for the possibility of transaction, ie a final dismissal by the EPP (not subject to review), following the compensation of damages and the payment of a lump-sum fine.[96] At the national level, European Delegated Prosecutors (EDelPs) would be responsible for enforcing the decisions with a double-hat model, allowing them to act in their function as national prosecutors as well.

### 5. *Relations with relevant EU actors and to non-participating Member States*

Under Article 325 TFEU all Member States are obliged to counter fraud against the financial interests of the Union. However, the positions of Denmark, the UK and Ireland in the Treaties, or the legal basis for establishing the EPPO by enhanced cooperation, clearly indicate that there is a real possibility of Member States being outside of the EPPO. Thus, fighting budgetary fraud will not solely happen within the EPPO framework. Notwithstanding this, the proposal failed to address both the relationship of non-participating Member States with the EPPO and the EPPO's impact

[94] Ibid, Art 32.

[95] Ibid, Art 86(2).

[96] Ibid, Art 29.

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on and interaction with the existing institutional framework. On the one hand non-participating Member States unwilling or unable to assist EPPO requests (such as the release of evidence for EPPO investigations) could fast become a safe haven for criminally obtained EU funds. On the other hand, the establishment of the EPPO with staff reallocated from OLAF and competence taken over from Eurojust will have an impact on fighting budgetary fraud in the Member States non-participating in the EPPO.[97] At present, OLAF and Eurojust have competence in the field of coordinating and assisting national anti-fraud authorities in fighting transnational fraud. As the future EPPO will complement the existing framework Eurojust and OLAF will play an important role with regard to Member States not participating in the EPPO.[98]

OLAF was established in 1999 within the first pillar as a supranational body, guided by common European interests.[99] Its competence has been strengthened continually, most recently with a 2013 Regulation.[100] In order to ensure that fraudsters do not divert EU funds, the office carries out administrative investigations both internally in the EU institutions and externally in the individual Member States and in third countries. The main outcomes of the investigations are its recommendations. OLAF cannot initiate criminal investigations, it has no prosecutorial powers, its recommendations are not binding on the Member States and its reports have no automatic evidentiary value in front of the national courts.[101]

The mission of Eurojust was acknowledged and reinforced in the Lisbon Treaty with Article 85 TFEU even providing for the possibility of conferring binding powers on Eurojust to initiate criminal investigations and resolve conflicts of jurisdiction. The Commission's 2013 proposal strengthened its European dimension by labeling Eurojust as an EU Agency. Nonetheless, the proposal did not tap the potential of Article 85 TFEU as it did not provide Eurojust with proper powers to initiate criminal investigations or to give binding decisions over conflicts of jurisdictions. Instead it provided its national members with far-reaching investigative powers in their own jurisdictions.[102]

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[97] See House of Lords, *European Union Committee, Fourth Report: The Impact of the European Public Prosecutor's Office on the United Kingdom*, HL Paper 53, para 51 http://www.publications.parliament.uk/pa/ld201415/ldselect/ldeucom/53/5302.htm. For further reading see C Van den Wyngaert, 'Eurojust and the European Public Prosecutor in the *Corpus Juris* Model: Water and Fire?' in N Walker (ed), *Europe's Area of Freedom, Security and Justice* (Oxford University Press, 2004); J Costa, 'Eurojust vis-à-vis the European Public Prosecutor' in J Apap (ed), *Justice and Home Affairs in the EU*, (Edward Elgar Publishing, 2004), p 141; JL Lopes da Mota, 'Eurojust: The Heart of the Future European Public Prosecutor's Office' (2008) (1–2) *eucrim* 62.

[98] See House of Lords Report, note 5 above, para 1.

[99] Regulation (EC) No 1073/1999 [1999] OJ L136. See note 7 above, p 31.

[100] Regulation (EU, EURATOM) No 883/2013 [2013], OJ L248.

[101] See note 7 above, p 32. See also J Vervaele, 'Gathering and Use of Evidence in the Area of Freedom, Security and Justice, with Special Regard to EU Fraud and OLAF Investigations' in C Nowak (ed), *Evidence in EU Fraud Cases* (Wolters Kluwer Polska, 2013), pp 21–56.

[102] See Luchtman and Vervaele, note 48 above, pp 137–138. See also A Weyembergh, 'The Development of Eurojust: Potential and Limitations of Article 85 of the TFEU', (2011) (2) *New Journal of European Criminal Law* 75.

There is a real possibility that the resources, administrative capacity and legal expertise required to establish the EPPO will significantly affect the work of Eurojust and OLAF. The explanatory memorandum of the EPPO Proposal declares that expertise and resources will be allocated from OLAF to the EPPO. This means that as a minimum, a substantial part of OLAF staff will be transferred to the EPPO. Additionally, in line with the Eurojust Proposal, the EPPO would gain exclusive competence for investigating budgetary fraud.[103] At the same time, it shall establish and maintain a special relationship with Eurojust, based on close cooperation and administrative links.[104] In fact, the support and coordination of Eurojust will be indispensible should the EPPO be established by enhanced cooperation.[105] Therefore, the establishment of the EPPO will not just have an impact on OLAF and Eurojust, but also on their relations with those Member States not participating in the EPPO. Nonetheless, the Proposal remained practically silent on the interactions between these Union bodies.

### *6. Evaluation: the proposal has lost sight of the original objectives*

In essence, the Commission's proposal watered down the *Corpus Juris* concept. It set the focus desperately on the embedment of the EPPO into national law, thereby basically neglecting the original problems of the fragmentation of national criminal laws, the transnational features of EU fraud and the recognition of foreign evidence. On paper, it provides for a European office, acting upon common European interests in a single legal area.[106] However, said single legal area would presuppose uniqueness, singularity and distinctness. This is not given in the proposal, as it refrains from providing the EPPO with Union wide mandate and powers. It upholds the differences in national laws and in effect maintains the traditional lacunas of transnational criminal investigations.

The EPP in the *Corpus Juris* was supported by a single set of offences and standardised rules of criminal procedure and evidence. In contrast, the Commission's proposal refers to the PIF Directive and relies on national laws. Thus, the offences will be defined by implementing national laws, while the investigative measures will be carried out according to differing national rules.[107] Considering the uncertain future of the PIF Directive, not providing for offence definitions in the proposed

[103] Art 3 Eurojust Proposal, see note 89 above.

[104] Art 86 TFEU in accordance with Art 57 EPPO Proposal (note 87 above) and Art 41 Eurojust Proposal (note 89 above).

[105] M Coninsx, 'The European Commission's Legislative Proposal: An Overview of Its Main Characteristics' in LH Erkelens et al (eds), *The European Public Prosecutor's Office An Extended Arm or a Two-Headed Dragon?* (Springer, 2014), pp 31–32. On the feasibility of enhanced cooperation for the EPPO see JJE Schutte, 'Establishing Enhanced Cooperation Under Article 86 TFEU' in Erkelens, ibid; S Pawelec 'Implications of Enhanced Cooperation for the EPPO Model and Its Functioning' in Erkelens, ibid.

[106] See note 87 above, Art 25.

[107] K Ligeti and A Weyembergh, 'The European Public Prosecutor's Office: Certain Constitutional Issues' in Erkelens et al, see note 105 above, pp 64–67.

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Regulation was a missed opportunity to provide the EPPO with a clear mandate. Even if in accordance with Article 83 TFEU a full harmonisation was not possible, standardised definitions in the Regulation would have provided for a more coherent material scope of the EPPO procedures.

With regard to the nature of the EPPO competence, the proposed exclusivity might enable a greater independence, by avoiding parallel investigations and facilitating more consistent prosecution policy. However, this would lead to an excessive workload of the office comprising minor cases that should not be dealt with at Union level.[108] The potential workload of the EPPO seems even more excessive in the light of the recent Court judgment in *Taricco*, which implies that its competence will possibly cover VAT fraud as well.

One might argue that the catalogue of investigative measures in the proposal and the classification on grounds of their authorisation provide for a certain degree of approximation of national laws. Nevertheless, given the considerable differences between the national laws, common minimum standards would have been necessary to facilitate consistent EPPO investigations.

The proposal also failed to consider how to apply the different systems of procedural guarantees in a transnational context, which might be both beneficial and detrimental for the defendant. This gains even more importance considering that coercive measures should be applied through national applicable law and should be carried out in liaison with the respective national authorities.[109]

The proposal imposed the mutual recognition of EPPO evidence even in the absence of equivalence of the rules or compatibility of the legal systems between the Member States concerned. This is an unusual choice of a concept. The simple fact that the evidence was gathered in EPPO investigations will not have an automatic trust-building effect and will not balance the different systems of procedural guarantees. The Union-wide recognition of evidence in the *Corpus Juris* was justified by the unified rules of procedure. In the case of a future European Investigation Order (EIO)[110] the trial court in one Member State will recognise evidence gathered in another Member State, given that the EIO was issued and as a rule executed (ie the evidence was gathered) according to the law of the trial State. Even so, due to the emerging gap between the equivalence of national regulations, the EIO and other mutual recognition instruments already allow for a kind of equivalence check, which is not provided for in the proposal.[111]

The assumption that the EPPO would be a national authority for the purpose of judicial review requires a more convincing justification, as the EPPO will be

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[108] See HL Paper 53, note 97 above, para 17.

[109] See Luchtman and Vervaele, note 48 above, p 140. See also NI Thorhauer 'Conflicts of Jurisdiction in Cross-Border Criminal Cases in the Area of Freedom, Security and Justice. Risks and Opportunities from an Individual Rights-Oriented Perspective' (2015) 2 *New Journal of European Criminal Law* 78.

[110] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters [2014] OJ L130/1.

[111] See C Janssen, *The Principle of Mutual Recognition in EU Law* (Oxford University Press, 2013), p 175.

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anything but a national authority. The objective of the proposal was to establish a European body to overcome problematic issues in transnational investigations; the EPPO's decision on prosecution will be made at Union level and the majority of the cases and decisions will consider more than one Member State. Integrating such various interests would require *ex post* judicial control of the validity of EPPO actions at Union level.[112]

The impact of the establishment of the EPPO on the existing framework in the area has not been addressed properly either. Overall, the Proposal failed to pay attention to the working relations between the EPPO and non-participating Member States, between EPPO, OLAF and Eurojust and on how the relations might change between non-participating Member States, and OLAF and Eurojust.[113] Addressing these issues would also have contributed to clarify the added value of the future EPPO. OLAF cannot settle whether an irregularity constitutes fraud, its recommendations do not bind Member States and its investigative reports have no automatic evidentiary value in front of national courts. The Commission's 2013 Proposal on Eurojust had not provided the unit with genuine powers to initiate criminal investigations or to resolve conflicts of jurisdiction. Thus, only the EPPO will have the competence to initiate criminal investigations and open prosecutions in a form that obliges Member States to follow up budgetary fraud cases.

### *C. Yellow card: the EPPO proposal and the principles of subsidiarity and proportionality*

In reaction to the proposed Regulation and in course of the early warning mechanism, 14 chambers of 11 national parliaments issued reasoned opinions stating that the Proposal failed to justify both the necessity for actions at Union level and the added value of the EPPO.[114] Further, four national parliaments sent opinions in the framework of political dialogue. Most arguments concerned the inaccuracy of the figures presented by the Commission, the lack of added value of EPPO investigations and its possible detrimental impact on the existing actors in the area and their future cooperation with non-EPPO Member States.

Regarding the quantitative indicators (the scale and effects of the offences and the efficiency of prosecutions) some opinions criticised the Commission's inaccurate use of OLAF figures;[115] mainly the inclusion of information on Denmark, the UK

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[112] See A Meij, 'Some Explorations into the EPPO's Administrative Structure and Judicial Review' in Erkelens, see note 105 above, pp 112–117. See also Luchtman and Vervaele, note 48 above, p 146.

[113] See HL Paper 53, note 97 above, paras 45–74. For the relation of the proposed Eurojust and EPPO regulations see C Deboyser, 'European Public Prosecutor's Office and Eurojust: 'Love Match or Arranged Marriage'?' in Erkelens, see note 105 above.

[114] The early warning mechanism in accordance with Article 12(b) TEU is set out in Protocol (No 2) to the Treaties on the application of the principles of subsidiarity and proportionality. See also KM Lohse 'The European Public Prosecutor: Issues of Conferral, Subsidiarity and Proportionality' in Erkelens, see note 105 above.

[115] House of Lords, *European Union Committee, Third Report: Subsidiarity Assessment: The European Public Prosecutor's Office*, para 4 http://www.publications.parliament.uk/pa/ld201314/ldselect/ldeucom/65/6503.htm; The Senate of the Parliament of the Czech Republic 9th Term, 345th

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and on VAT fraud and the lack of information on prosecution rates in cross-border cases. In line with Protocol No 22 to the Treaties, Denmark is not bound by EU measures on policing and criminal law adopted after the entry into force of the Lisbon Treaty. Irrespective of Denmark's future position with regard to judicial cooperation in criminal matters, at the time the proposal was put forward it was automatically excluded from participating in the EPPO.[116] In a similar way, according to the 2011 European Union Act, the UK will most certainly not participate in the EPPO, unless a national referendum and an Act of Parliament approve it.[117] Therefore, the debatable inclusion of information on Denmark and the UK has an impact on estimations of the future workload of the EPPO, and thus on the necessity for actions at Union level. To similar effect, the figures in the Impact Assessment included VAT fraud within the competence of the EPPO. However, at the time the proposal was published (in fact to the present day), the positions of the EU institutions and that of the Member States on whether the PIF Directive (the envisaged EPPO competence) would cover VAT fraud differed significantly. In the recent *Taricco* judgment, the Court ruled that the PIF Convention covers VAT fraud. Therefore it seems inevitable that in one form or another (through the PIF Directive or the PIF Convention) the competence of the EPPO will cover VAT fraud as well. In any event, referring to VAT fraud in support of action at Union level at the time the Proposal was published was inaccurate, as the final decision on whether these are to be considered as PIF offences was still pending. The opinion of the Czech Senate further indicated that despite the proposed competence of the EPPO in cross-border investigations, the figures did not include follow-up actions taken in cross-border cases.[118] Regarding the accuracy of data it must be noted that a comprehensive representation of the real scale and effects of PIF offences would also require Member States to be willing and able to provide the Commission with more data.

The opinions further questioned the assumptions with regard to the added value of the EPPO, given that its powers would largely replicate those already available for the national authorities. Thus the EPPO would be fully dependent on the existing source of information and conditioned by the effective operation of the national authorities.[119] The opinion of the House of Lords underlined that with the possible transfer of a substantial part of OLAF's staff to the EPPO, and with Eurojust losing

*(F'note continued)*

Resolution on the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, Senate Press no. N 082/09, para 3, http://www.ipex.eu.

[116] On 3 December 2015 a referendum decided negatively on the possibility of a selective (flexible) opt-in into EU Justice and Home Affairs. For a fuller account, see S Peers, 'Denmark and EU Justice and Home Affairs Law: Really Opting Back In?' (*EU Law Analysis*, 8 October 2014) and S Peers, 'Denmark and EU Justice and Home Affairs Law: Details of the planned Referendum' (*EU Law Analysis*, 17 March 2015) http://eulawanalysis.blogspot.co.uk/.

[117] The European Union Act, 2011, c 11 s 6 (3) prohibits any UK government from joining in a move towards introducing a European Public Prosecutor, unless it was approved by a national referendum and an Act of Parliament. See Spencer, note 1 above, p 363.

[118] See the Czech Senate Resolution, see note 115 above, II.3.

[119] Ibid, II.2.

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its coordination role in EU fraud cases above the EPPO threshold, the Proposal would even adversely impact their work with Member States not participating in the EPPO. The opinion concluded that the EPPO in this form would create extra fragmentations of different sorts. It would lead to separate systems for combating fraud and EU budgetary fraud, and to differences between Member States that participate in the EPPO and those that do not.[120] The opinions therefore suggested waiting to see how the existing and future measures that the EPPO Regulation would complement (including the 2008 Eurojust Decision, the 2013 OLAF Regulation and – if adopted – the proposed PIF Directive ) unfold their full impact before negotiating any new institution.[121]

The number of votes, which went for the opinion that the draft measure breaches subsidiarity, forced the Commission to review the Proposal under the yellow card procedure provided for in Article 7 (2) of Protocol No 2. In its Communication, the Commission argued that proportionality is secured amongst others through the decentralised structure, by the integrated status of the EDelPs and by the significant reliance on national legislation. The Commission further stated that the preamble of the proposal provided for various arguments and figures to underline why the objectives set out in Articles 86 and 325 TFEU cannot be sufficiently achieved at national level; ie why the proposal conforms to the principle of subsidiarity. These included the scale and effects of the related offences, the insufficient number of prosecutions at national level, the fragmentation of the applicable national laws and the future EPPO's 'exclusive competence to prosecute such offences'.[122] Regarding the Commission's arguments, the following must be said. It is true that the lack of accurate data about the scale and effects of PIF offences – also due to the inability and reluctance of the Member States to provide the Commission with relevant data – does not neglect the relevance and reality of budgetary fraud. The low number of prosecutions at national level, however, does not necessary mean that the national authorities do not follow up OLAF investigations. It only shows that they do not necessarily lead to criminal procedures. The exclusive competence of the EPPO is no real argument for the establishment of the office, as the exclusivity derives from the proposal itself.[123] Finally, the weakest argument is the need to establish the EPPO on grounds of the fragmentation of national laws. This argument is an own goal; if there was one thing maintained by the proposal, then it is the considerable fragmentation of national laws.

The Communication of the Commission concluded that the Proposal is in line with the principles of subsidiarity and proportionality enshrined in Article 5 (3) and (4) TEU and that a withdrawal or any amendment of the Proposal is not necessary.[124]

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[120] House of Lords Report, see note 115 above, paras 14, 18.

[121] Ibid, para 13.

[122] See note 87 above, Rec 5.

[123] The Council drafts have already moved on to a concept of shared competence. See Part VA1 below.

[124] COM (2013) 851 final, p 13. See also the 2013 Annual Report on Subsidiarity and Proportionality COM (2014) 506 final, para 3.

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## V. TOO MANY CHIEFS AND NOT ENOUGH INDIANS: THE REVISED DRAFT UNDER THE LUXEMBOURG PRESIDENCY

Though the Commission chose to maintain its original proposal, a first revised text was presented by the Greek Presidency in May 2014, and further revisions by the Italian and Latvian presidencies.[125] The Presidency drafts further watered down the Commission's Proposal, presumably in search of a low-key compromise to enable a unanimous decision in the Council.

The main changes introduced following the yellow card episode included a collegiate model at central level and shared competence between the Union and the Member States. Additionally, the rules on dismissal and transaction were altered, the list of investigative measures was continually shortened and the inclusion of the notion of a 'single legal area' – the concept from which the whole process originates – was proposed.[126]

### *A. Developments under the Luxembourg Presidency*

The most current draft to date was presented by the Luxembourg Presidency in December 2015 maintaining the changes introduced by the previous presidencies and introducing some further ones.[127] The text enjoys 'broad conceptual support' in the Council over the first 35 Articles, including the EPPO's mandate and its structure.

#### *1. Triangle of shared, priority and ancillary competences*

According to the draft, the competence to fight EU budgetary fraud would be shared between the Member States and the Union, with cases with damages under a certain threshold remaining with the Member States. The priority of Union competence enshrines in Article 20(1) as the EPPO may initiate investigations both on its own or *jus primae noctis* by evoking a case from the national authorities.

The material scope of the EPPO's competence remains defined by reference to the PIF Directive, but was extended also to participation in criminal organisations, if the focus of the criminal activity is to commit PIF offences.[128] The draft upholds the EPPO's ancillary competence for inextricably linked other offences if the penalty for the PIF offence is more severe than the maximum sanction for the inextricably linked offence. In the case of equal sanctions, the EPPO is only competent if the inextricably linked offence was instrumental to commit the PIF offence. Overall, the EPPO cannot exercise its ancillary competence if the damage caused or likely to be caused to the Union does not exceed the damage caused to another victim.[129]

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[125] Presidency Notes from the Council to the Delegations 2013/0255 (APP).

[126] On the proposals of the Greek and Italian Presidencies see A Damaskou, 'The European Public Prosecutor's Office. A Ground-Breaking New Institution of the EU Legal Order' (2015) 6 (1) *New Journal of European Criminal Law* 126, pp 143–149. See also Lohse, note 114 above, pp 171–173.

[127] http://db.eurocrim.org/db/en/doc/2404.pdf

[128] As defined in Framework Decision 2008/841/JHA and implemented in national law.

[129] Draft Council Regulation on the establishment of the EPPO, Art 20 (3), see note 127 above.

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### 2. *The enlargement of the central level*

While the Commission's Proposal made an attempt to keep the EPPO as small as reasonable, the Presidency drafts introduced the College as an additional layer between the central unit and the delegates. According to the latest draft, the College would contain one European Prosecutor per participating Member State and be led by the European Chief Prosecutor. It would take administrative and strategic decisions, especially in the interest of a consistent prosecution policy, with no powers to take operational decisions in individual cases. The European Prosecutors would form Permanent Chambers, which would ensure the coordination of cross-border cases and could also direct and monitor individual investigations and prosecutions when necessary. The Permanent Chambers decide whether to dismiss a case or to send it to trial and about the possibility of settling a case through transaction. The European Prosecutor supervising an investigation or prosecution participates in the deliberations of the Permanent Chamber as liaison and channel of information between the Permanent Chambers and the respective EDelP. Its right to vote however shall not cover decisions on delegation, (re)allocation or whether to bring a case to judgment. The text maintains the double-hatted status of the EDelPs who would be responsible for the actual investigations and prosecutions. The delegates shall have the same powers as national prosecutors in addition to the specific powers conferred on them by the Regulation.

## B. *Evaluation of the Luxembourg Presidency's draft*

### 1. *EPPO structure: new layers of complexity*

Even if the EPPO had had to operate entirely within national law, the small central unit in the Commission's proposal would have ensured efficient decision-making. The college model will provide for increased complexity in the decision-making, at least in cross-border cases. The College means a significant enlargement of the central unit from one EPP as proposed by the Commission to *ad absurdum* up to 28 European Prosecutors. In any case the current draft appears to be a clear case of too many chiefs and not enough indians.

The collegiate structure may enable more efficient monitoring of the quality and shape of investigations and prosecutions but it will be certainly challenging to take swift decisions (even in the Permanent Chambers) on the basis of large quantities of information.[130] One assumes that if the opinions of the delegated and supervising European prosecutors differ on essential aspects of the case, the files will have to be translated to enable the Permanent Chamber a clear and independent view over the case – another time consuming undertaking.

[130] Opinion of Mike Kennedy, former President of Eurojust. See HL Paper 53, note 97 above, paras 33, 36. On the collegiate model in general see S White, 'A Decentralised European Public Prosecutor's Office. Contradiction in Terms or Highly Workable Solution?' (2012) 2 *eucrim* 67. See also note 68 above, p 13.

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The collegiate structure at central level bears some resemblance to court structures in general (with the supervising European Prosecutor presenting the case to the Permanent Chamber) and to the Eurojust College in particular. It is however important to point out the qualitative differences between the Eurojust and the EPPO colleges. While the national members of Eurojust are financed and responsible under national rules, the European Prosecutors will be financed and responsible under EU rules. Thus, decisions of the Eurojust College are based on intergovernmental mechanisms, while those of the EPPO College will be genuine Union decisions. The current powers of the Eurojust College are restricted to make requests to national authorities, while the EPPO College will make binding decisions on whether to investigate, prosecute or bring cases to the courts.[131]

The proposed liaison role of the European Prosecutors between national and Union level and their envisaged power to instruct their own national authorities (in individual cases and under certain circumstances) will diminish their European quality. The question of how 'European' the actions of these European Prosecutors might be arises inevitably. To prevent national interests interfering with EPPO investigations their rights to vote has been already limited, excluding amongst others decisions on the reallocation of cases or the sending of a case to trial. The new function of the European Prosecutors as direct links between the decisions at national and Union level will require clear rules of appointment to ensure their impartiality.

According to the draft, the EDelPs shall have the same powers as their national peers complemented with specific powers and status under the EPPO Regulation. Considering the objectives of setting up the EPPO, the delegates should be able to instruct and monitor the national investigative authorities. This will certainly require the amendments of national criminal laws or even those of national Constitutions in Member States that do not provide for such prosecutorial powers.[132] The differentiation between the respective European and national roles of the EdelPs might also need to be spelled out in more detail.[133] According to the current text, the dismissal of EDelPs is a joint decision of the EPPO and the national authorities with regard to actions under their European hats,[134] while with regard to actions under their national hats it is a decision of the national authorities. However, it would be essential to require a common decision on dismissal even if the grounds relate to a case under the EDP's national hat. This would avoid politically motivated dismissals for non-EPPO cases on paper, but for being too active in EPPO cases in reality.

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[131] The Commission's 2013 proposed regulation on Eurojust suggests that the powers of Eurojust will not be significantly expanded in the future.

[132] For greater detail see PJP Tak (ed), *Tasks and Powers of the Prosecution Services in the EU Member States*, vol 1 (Wolf Legal Publishers, 2004).

[133] Draft Council Regulation on the establishment of the EPPO, Art 12, see note 127 above.

[134] Ibid, Art 15(4).

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### 2. *The counteraction of competences*

The concept of shared competence provides for a better balance of the EPPO's future workload and leaves with Member States the right to initiate proceedings on their own as well.[135] However, Article 7 (2) of the proposed PIF Directive allows Member States to fight budgetary fraud with other than criminal penalties if the damage or advantage is less than EUR 10,000. The interaction of the two provisions might lead to cases not being prosecuted at any level. Come what may, the text will generally need clearer criteria of distribution of roles between the national authorities and the EPPO.[136]

The EPPO's ancillary competence might be debatable, as Article 86 TFEU does not provide for it explicitly. If, however, we agree that the EPPO has ancillary competence for offences instrumental to commit the EPPO offence, the current text might not achieve its objective and needs further considerations. Under current Article 20 (3) all cases where the damage caused or likely to be caused to the Union's financial interests does not exceed the damage caused to another victim will be evocated from the EPPO. Consequently, national authorities will proceed with cases despite the clear presence of a PIF-offence under EPPO competence and damage caused to the Union. Furthermore, in legal systems with discretion to prosecute these cases might get lost completely whenever the prosecution service decides not to go on with the case. That would be not much of a difference to the current situation regarding OLAF recommendations.

### 3. *Loopholes in the concept of Union-wide decisions*

The principle of legality is no longer defined as a basic principle, though it appears in the context of initiation of investigations.[137] This will lead to situations in which cases the EPPO delegates back to national level might not get prosecuted in Member States with discretion to prosecute. This will also create discrepancies regarding the position of the defendant. Defining legality as a basic principle would only apply for PIF offences and would not interfere otherwise with national criminal procedure systems based on the discretion to prosecute.

As an alternative to prosecution, the former drafts allowed for settling specific cases through transaction. This alternative is currently subject to further negotiations. There are three important aspects that ought to be considered before the final provisions on transaction are agreed upon. First, the range of applicable offences; second, the procedure governing transaction (and possible consequences for national laws) and third its legal consequences. There are Member States where the settlement of cases is a prosecutorial decision, while in others it requires authorisation by a judge. There are also legal systems that do not provide for settlements in fraud cases at all.[138] Questions needing to be answered in advance

[135] See HL Paper 53, note 97 above, paras 35–37.

[136] Ibid, paras 24–29.

[137] Draft Council Regulation on the establishment of the EPPO, Art 22, see note 127 above.

[138] For further details see Ligeti, note 15 above.

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include whether a settlement upon prosecutorial decision will be regarded as *res judicata* and, if yes, only for settlements agreed by the EPPO or also for settlements negotiated by national prosecutors? Will transactions be registered at Union level or also at national level?

### *4. Investigative powers and the admissibility of evidence*

The list of investigative measures was continually cut back in the different drafts with an increasing reliance on national laws governing the detailed rules. Thus, EDelPs may have the same powers as their respective national colleagues, but they will certainly have different investigative powers in the different Member States. The variable geometry of powers will also lead to a variable geometry of fair trial rights for the defendants in EPPO cases in the different Member States. Thus, this legislative approach fails to correct one of the important hindrances in transnational prosecutions: the recognition of evidence produced under foreign procedural rules. The Presidency text maintains the concept proposed by the Commission, according to which – beside some restrictions – evidence gathered in EPPO investigations should be admissible throughout the Union. An imposed obligation for the recognition of foreign evidence, that is. It seems that there was no recourse to the European Investigation Order (EIO), as it allows for grounds for refusals. In particular the refusal to execute an EIO on human rights grounds could jeopardise EPPO investigations given the discrepancies in the Member States procedural safeguards.[139] Neither would the EIO assist the concept of binding operative decisions taken at central level, as it allows the executing state to apply less intrusive measures. In case this concept remains in the final text, the Member States might still refuse the evidence by reason of not being gathered in accordance with basic principles or values laid down in their Constitution.[140] This could result in a new *Solange I* – saga, but this time in the area of criminal law, which should be clearly not in the interest of the Union legislator.[141]

### *5. Relations to other actors in the area*

The impact of the EPPO on OLAF and Eurojust as well as their relations to each other will be subject to future negotiations. It is clear that the EPPO's impact on OLAF will be of existential nature, as its competence will be severely cut back to non-fraudulent cases of EU staff and potentially to fraud cases under the PIF threshold or concerning Member States not participating in the EPPO. In addition, the proposal of the Commission already envisages that sources and staff from OLAF

[139] Article 11(1)(f) of the EIO Directive. See I Armada, 'The European Investigation Order and the Lack of European Standards for Gathering Evidence – Is a Fundamental Rights-Based Refusal the Solution?' (2015) 1 *New Journal of European Criminal Law* 8. See also Luchtman and Vervaele, note 48 above, pp 141–149.

[140] See for instance Article 28 Hungarian Basic Law. See also KG Šugman 'European Public Prosecutor in the Context of the Slovenian Criminal Law' (2004) *Slovenian Law Review* 123, p 134.

[141] BVerfGE 37, 271.

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would be allocated to the EPPO. The position of Eurojust seems more secure as its objectives differ from that of the EPPO. In the Treaty context the EPPO will combat fraud, on its own initiative, with a mandate to initiate criminal investigations even in cases concerning only one member state. This is different and beyond the request-based, multilateral cooperation approach of Eurojust actions.

Non-participating Member States will certainly not be keen on becoming safe havens for Euro fraud and the EPPO will also have to deal with cases where PIF offences were committed on the territory of EPPO Member States by nationals of non-participating Member States. Therefore it will be essential to lay down the rules of cooperation. This would be possible through the current mutual recognition system, if the respective Member States recognise the EPPO accordingly.

It will be also necessary to clarify the rules governing the EPPO's relations with third states. It might happen with the amendment of existing documents or by new agreements under Article 217 TFEU. In the meantime, the European Delegated Prosecutors could interact with the authorities of third countries under their national hats. This solution relies and depends on the diverse existing agreements between Member States and third countries but would not require separate negotiations to recognise the EPPO.

## VI. CONCLUSION

The concept of a European prosecution service operating within a single legal area as proposed in the *Corpus Juris* study aimed to tackle impediments to the prosecution of transnational fraud cases, namely substantive disparities in national criminal justice systems and the reluctance of Member States to initiate prosecutions.

The endless compromises required to keep the Member States in the EPPO project have shifted the focus of negotiations from how to create a European body with identical investigative powers to how to integrate the future European body into the different national legal systems. As a result, the latest drafts envisage a system where prosecutorial decisions are made in a complex college model; the mandate of the EPPO is defined by reference to the PIF Directive with the applicable national laws determining its investigative powers.

In this paper, I have argued that the most uniform EPPO mandate could be ensured through offence definitions in the Regulation as both the PIF Directive and the PIF Convention require transposal into national laws. The shared competence between the EPPO and the Member States promises a more manageable workload, but the drafts create cracks in the system, in which cases could get lost without being prosecuted at any level.

The legislative solution of applicable national laws determining the investigative powers of the EPPO neglects the fragmentation of the criminal procedure systems – one of the main arguments for setting up the EPPO. The obligation imposed on national courts to recognise EPPO evidence will not compensate for the different quality of procedural safeguards in the Member States. Consequently, providing for more detailed rules in the Regulation could provide for more identical investigative powers of the Office.

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So can this EPPO model resolve any of the initial problems, or will it transform the Trojan horse into a white elephant? It would do an injustice to state that there is no added value to the existing framework. Unlike the decisions of OLAF and Eurojust, the EPPO decisions have an essentially different quality when obliging national authorities to investigate and prosecute budgetary fraud cases. The current draft enables autonomous and binding decisions at Union level to prosecute budgetary fraud at the national level. Thus, the Member States seem to have been agreed on one of the original points of contention, on conferring certain prosecutorial decisions – a traditional attribute of national sovereignty – to the Union level. It is therefore all the more surprising that Member States are reluctant to provide the new Union body with an identical mandate and powers to ensure the equality, consistency and efficiency of these prosecutions among the different Member States. The proposed model will help to increase the number of investigations and prosecutions but cannot solve the problems related to the fragmentation of national criminal laws, which would require more detailed rules on the mandate and powers of the EPPO in the future Regulation.

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