

# Introduction

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THE CONCEPT OF a European Public Prosecutor originated in the *Corpus Juris* drafted some 17 years ago.<sup>1</sup> In 1995, a group largely consisting of academics under the chairmanship of Professor Mireille Delmas-Marty proposed a scheme to tackle the problem of non-investigation and non-prosecution of crimes against the financial interests of the EU. The *Corpus Juris* contained essentially three things: first, a single set of offence definitions, applicable throughout all Member States, second, a common set of procedural rules for the investigation and prosecution of these offences, and, last but not least, the European Public Prosecutor to conduct investigations and prosecutions. Looking back at the *Corpus Juris* with the historical distance of today confirms once more how imaginative and ambitious the vision of the authors was.

It took more than 15 years to have a legal basis for the European Public Prosecutor's Office in the EU Treaty. This is remarkable because policy developments that took place after the *Corpus Juris* at EU level demonstrate that the Member States—though rather indifferent to the idea of an EPPO—had to recognise at the same time that coordinated steps were necessary in respect of EU fraud and the lengthy and cumbersome procedures of international cooperation in criminal matters. The solution proposed as an alternative to the vertical model of criminal justice integration suggested by the *Corpus Juris*, was to apply a more horizontal model based on mutual recognition.<sup>2</sup> Today we look back on more than 10 years of practical experience with mutual recognition in the criminal justice field. The principle of mutual recognition did certainly bring a change of paradigm in judicial cooperation. However, it did not solve the particular problem of EU fraud and other offences committed to the detriment of the EU budget. That the present Treaty, in Article 86 TFEU, provides for the EPPO is a recognition of the fact that the problems that the *Corpus Juris* was intended to solve are real and need to be faced.

Article 86 TFEU is certainly one of the most delicate provisions of the Lisbon Treaty. It is sensitive from both a political and a legal point of view: the establishment of the EPPO—both because of its strong symbolic value and because of the potential powers it may have—clearly challenges Member States' sovereignty and the powers, institutional

<sup>1</sup> M Delmas-Marty, JAE Vervaele (eds), *The Implementation of the Corpus Juris in the Member States*, volumes 1–4, (Antwerp, Intersentia, 2000).

<sup>2</sup> Presidency Conclusions, Tampere European Council, 15 and 16 October, 1999, points 33–37.

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organisation and realistic aspirations of existing EU criminal justice bodies. From a legal point of view, its implementation raises a number of questions that need to be answered.<sup>3</sup>

A key issue will be the definition of the material scope of competence of the EPPO. According to Article 86(1) TFEU, the purpose of the EPPO will be 'to combat crimes affecting the financial interests of the Union'. At the same time, however, Article 86(4) TFEU provides for extending the competence of the EPPO—by unanimous decision of the Council—'to include serious crimes having a cross-border dimension'. The interpretation of Article 86(1) and (4) TFEU raises many legal and technical issues that will influence the room for manoeuvre available to the Member States. First, which crimes fall within the ambit of crimes 'affecting the financial interests of the Union'? Only those that actually or potentially harm the financial interests of the EU, like fraud, for example? Or also other behaviour that indirectly affects the allocation and management of EU funds both at the European and national level, which are, however, much more linked to the proper, impartial and transparent functioning of the EU's public administration, eg corruption?<sup>4</sup> Furthermore, is it sound to limit the competence of the EPPO to the protection of the financial interests of the EU, a phenomenon which only indirectly touches on the lives of EU citizens compared to general cross-border criminality, for example? What is the exact relationship of Article 86(1) and (4) TFEU? Is it possible to establish the EPPO through enhanced cooperation of at least nine Member States with an enlarged competence to prosecute serious cross-border crime?<sup>5</sup> And most importantly, does the creation of the EPPO require harmonised definition of offences falling in the competence of the EPPO?

A second group of questions related to the implementation of Article 86 TFEU concerns the procedural aspects of such European office. According to Article 86(3) Member States will have to decide upon the general rules applicable to the EPPO, the conditions governing the performance of its functions, the rules of procedure applicable to its activities (investigation, prosecution, bringing to judgment), the rules of procedure governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by the EPPO in the performance of its functions. Article 86(3) TFEU leaves completely open the procedural framework of the EPPO. Should the EPPO operate on the basis of a harmonised set of European rules of criminal procedure spelling out investigative measures, prosecutorial powers, rules of evidence and procedural safeguards? Or should it rather apply the national criminal procedural laws of the Member States and rely on

<sup>3</sup> Initial reactions were discussed at the conference 'Quelles perspectives pour un ministère public européen: Protéger les intérêts financiers et fondamentaux de l'Union' organised by the Cour de Cassation on 11–12 February 2010 (publication by Dalloz, Paris 2010) and the information session organised by Eurojust on 28 April 2010. Issues discussed included, *inter alia*, the development of the EPPO in compliance with the Area of Freedom, Security and Justice, the effects of a possible enhanced cooperation, the meaning of the establishment of the EPPO 'from Eurojust', the EPPO's capacity for investigation and role of Europol and OLAF, relations between the EPPO and national authorities, the meaning of 'crimes affecting the financial interests of the EU', powers of investigation of the EPPO, and harmonisation of specific rules of procedure.

<sup>4</sup> In that context it is certainly instructive to refer to the Preamble of the First Protocol to the PIF Convention, which explicitly stated that European financial interests can be affected not only by fraud, but equally by other criminal conduct such as criminal behaviour of European or national officials when managing EU funds, for example. Protocol drawn up on the basis of Art K3 of the Treaty on European Union to the Convention on the protection of the European Communities' financial interests [1996] OJ C313—/2.

<sup>5</sup> It is hard to imagine that the Council would agree to extend the material scope of the EPPO by unanimous decision to cover cross-border crime, on the one hand, and disagree at the same time on the establishment of the EPPO per se, on the other. In the author's view, the EPPO's competence cannot be extended on the basis of Art 86(4) TFEU if the EPPO is set up by enhanced cooperation.

mutual recognition? Which powers should the EPPO have at all? And how can the judicial control of the acts of the EPPO be best secured? Should it be the national judge or rather a European judge authorising and reviewing the acts of the EPPO?<sup>6</sup>

Finally the institutional aspects of the EPPO need to be answered, too. What is clear from Article 86 TFEU is that the EPPO will be a supranational body within the Area of Freedom, Security and Justice and must, therefore, comply with the objectives of that area, namely ‘respect for fundamental rights and the different legal systems and traditions of the Member States.’<sup>7</sup> Furthermore, Article 86 TFEU stipulates that the EPPO shall be established from Eurojust and not from OLAF. Within these confines, the institutional framework of the EPPO, however, is left open. Indeed, much of the debate that evolved around Article 86 TFEU after the entry into force of the Lisbon Treaty focused on the institutional aspects of the EPPO and on how to establish an EPPO from Eurojust.<sup>8</sup> One may envisage at least three main scenarios here. One possibility would be to have a collegiate EPPO—resembling Eurojust—where the EPPO would be a body composed of prosecutors appointed by each Member State, taking majority decisions on initiating investigations and prosecutions and on resolving conflicts of jurisdiction. Each EPPO member could have the power to give binding instructions to national authorities to initiate investigations.<sup>9</sup> Alternatively, the EPPO could be a supranational body consisting of a central office assisted by deputy prosecutors in each Member State. Under this arrangement, the deputy prosecutors would operate as satellite offices of the central EPPO in the respective Member States, with the chief prosecutor (central office) giving instructions to the deputy prosecutors to investigate and prosecute cases.<sup>10</sup> One may also imagine a fully supranational body, where the EPPO would be a hierarchically organised service consisting of a chief prosecutor and several specialised deputy prosecutors competent to act throughout the whole EU, directly

<sup>6</sup> It is astonishing that Art 86 TFEU is silent on the judge of freedoms. See critics on the neglected status of the judge of freedoms during the 2002 public consultation procedure on the EPP in Follow-up report on the Green Paper on criminal law protection of the financial interests of the Community and the establishment of a European Prosecutor, COM (2003) 128 final, 15 March 2003.

<sup>7</sup> Art 67 of the Treaty on the Functioning of the European Union, [2010] OJ C83/47.

<sup>8</sup> In 2010, Eurojust organised an information session and a strategic seminar. The information session was held in The Hague on 28 April 2010, and resulted in an informal document containing the conclusions. The strategic seminar was organised jointly with the Belgian Presidency on 20–22 September 2010 in Bruges, Doc 17625/10, REV 1, Brussels, 9 December, 2010.

<sup>9</sup> This model has been referred to as the ‘Eurojust Plus’ model. Under this model the national members of Eurojust would have binding powers to order the start of investigations by their national authorities and to issue decisions to resolve conflicts of jurisdiction. It is open to question whether it would be possible to implement such reform of Eurojust on the basis of Art 85 TFEU. According to Art 85(1)(a) and (c) TFEU, the future regulation dealing with the powers of Eurojust ‘may include the power to initiate investigations ... particularly ... relating to offences against the financial interests of the Union.’ At the same time, Art 85(2) stipulates that ‘formal acts of judicial procedure shall be carried out by the competent national officials’. The meaning of Art 85(1)(a) read together with Art 85(2) is far from clear: does it mean that Eurojust—via its national members?—can order the commencement of investigations by the national authorities in the Member States? Or rather that the national members of Eurojust—as competent national officials—can commence investigations to be followed up by the national authorities in the Member States? The extent of binding powers attributed to Eurojust in the future depends not only on the interpretation of ‘to initiate’, but also on the scope of meaning of ‘investigations.’ See A Weyembergh, ‘The Development of Eurojust: Potential and Limitations of Article 85 of the TFEU’ (2011) 2 *New Journal of European Criminal Law* 75–99.

<sup>10</sup> See on this option JAE Vervaele, *European Enforcement Agencies in the Area of Freedom, Security and Justice: the Eurojust European Public Prosecutor binomial*, Proceedings of the 5th European Jurist Forum, Budapest 2009, 117–38.

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bringing suspects to judgment before national courts. And certainly several sub-options and combinations of these models are also possible.

In fact, issues of substantive competence, procedural law and institutional framework are intertwined. It is hard to imagine on the one hand a collegiate-type EPPO working on the basis of harmonised substantive and procedural provisions. On the other hand, it would make little sense to have a fully supranational EPPO working on the basis of national offence definitions and national procedural law. However, the model where the EPPO would be supported by national satellite offices in the Member States would be open to the use of both national and harmonised substantive and procedural criminal laws.

Article 86 TFEU leaves it entirely to future regulation on the EPPO to define all aspects of the future office. This openness represents a challenge for the implementation. The Member States have to find the answers to the above questions at a political level. The current financial crisis will certainly strongly influence the attitude of the Member States. In June 2012 the EU Council resolved to strengthen the economic and monetary union in order to ensure growth and stability in the EU.<sup>11</sup> In this context—as Vice President Viviane Reding recently emphasised<sup>12</sup>—the EPPO is an essential building block. It may help consolidating the economic and monetary union by strengthening taxpayers' confidence in the functioning of the EU institutions and to protect the fundamental values on which the EU is based.

According to the 2010 Commission report on the protection of the Union's financial interests, suspected fraud amounts to approximately 600 million euros annually on the revenue and expenditure side.<sup>13</sup> It can be assumed that this is only the tip of the iceberg. According to the experience of OLAF, offences against the financial interests of the EU increasingly have a cross-border dimension. Therefore, national practitioners who investigate these offences often do not see the whole picture, but only the national part of the case. If mutual legal assistance is sought by national practitioners, this is generally done in order to investigate and prosecute only the national part of the offence. Furthermore, even if national authorities detect an offence against the financial interests of the EU, they often limit their investigation to the national aspects of the case, ignoring its European dimension. They may feel that the European dimension hampers such cases, due to cumbersome and lengthy international cooperation.<sup>14</sup> Though Eurojust may help to coordinate national prosecutions in the affected Member States, Eurojust implies by its nature the fragmentation of prosecution.

The Lisbon Treaty provides for a set of tools to effectively counter offences against the financial interests of the EU. Under Articles 310(6), 325, 85 and 86 TFEU, the EU will have the competence to adopt criminal law provisions to protect the financial interests of the EU. As a first step, the Commission presented in July 2012 its proposal on the harmonisation

<sup>11</sup> EUCO 76/12, Conclusions of the European Council of 28–29 June 2012, Brussels, 29 June 2012.

<sup>12</sup> Speech entitled 'The future legal and institutional framework of combating fraud against the EU's financial interests' held on the occasion of the meeting of Prosecutor Generals and Directors of Public Prosecution of the EU, Brussels, 26 June 2012.

<sup>13</sup> COM (2011) 595 final, and accompanying Staff Working Documents SEC (2011) 1107, 1108 and 1109 final.

<sup>14</sup> SEC (2011) 621 final, table 2.2; and OLAF, Eleventh operational report of the European Anti-fraud Office, 1 January to 31 December 2010.

of offence definitions in respect of offences against the financial interests of the EU.<sup>15</sup> This should be followed by a second legislative proposal on strengthening the procedural framework for prosecuting these offence. Finally, according to the working plan of the Commission, the Commission will present a legislative proposal based on Article 86 TFEU to set up an EPPO in 2013.

The adoption of the Lisbon Treaty created new momentum to discuss the details of establishing the EPPO. This book is the first of two volumes documenting the outcome of a research project titled 'European Model Rules for the Procedure of the European Public Prosecutor's Office', carried out at the University of Luxembourg. The research took place in the period February 2010 to March 2012, financed under the Hercule II Programme of the EU Commission, and with co-financing by the University of Luxembourg. The aim of the research project was to elaborate a set of rules with a model character delineating the investigative and prosecutorial powers of a European Public Prosecutor's Office (EPPO), the applicable procedural safeguards and the evidential standards. To sum up briefly, the project mainly concerned procedural law under which a future EPPO might operate.

The research had two phases: the first phase of the project concentrated on a thorough analysis of 27 different national legal systems, of which 20 are published in this first volume. Two sets of detailed questionnaires were addressed to national experts in each Member State,<sup>16</sup> covering issues related to the general aspects of criminal procedure, the attribution of investigative and prosecutorial powers, procedural safeguards and evidence. A synopsis was drafted respectively and will be published along with the Model Rules and explanatory notes in the second volume.

This first volume consists of two parts. The first part contains a description of the pre-trial phase of the criminal procedure in 20 jurisdictions representing 19 EU Member States.<sup>17</sup> Such a description, in English, covering most of the EU Member States was a major effort and stands on its own as an important contribution to comparative criminal procedure. Each national report follows a common scheme concerning financial criminal investigations. It starts with a description of the statutory basis and constitutional restraints of criminal procedural law, the general structure of criminal procedure and the main actors. This is then followed by a description of the investigative measures and prosecutorial tools available to the authorities as well as procedural safeguards. The second part is a series of legal essays dealing with key issues related to the establishment of the EPPO. These include studies of vertical cooperation in administrative investigations in subsidy and competition cases, the accession of the EU to the European Convention on Human Rights, judicial control in cooperation in criminal matters, mutual recognition, and decentralised enforcement of European competition law.

Thus, this first volume contains all the background that inspired the elaboration of the Model Rules. It will be followed by a second volume which shall contain the comparative analysis of the national systems along the lines of each investigative and prosecutorial measure and procedural safeguard. Furthermore, the second volume will set out the Model

<sup>15</sup> 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, Brussels, 11 July 2012.

<sup>16</sup> The research did not cover Cyprus, as we could not identify an appropriate expert. For the United Kingdom we had separate experts for England and Wales, on the one hand, and for Scotland on the other hand.

<sup>17</sup> Austria, Denmark, England and Wales, Estonia, France, Germany, Hungary, Ireland, Italy, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Scotland, Slovenia, Spain and Sweden.

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Rules, with explanatory notes in English and French. It will be concluded by a final report summarising the findings of the research and reporting on the prospects for the proposed reform.

The content of this volume and the following volume represents the contributions of both academics and practitioners. This study group was composed of senior professors and younger colleagues. Their names and further details appear on page xlv. Further detailed information on the research project (participants, reports, conferences, etc) is available at the project website: [www.eppo-project.eu](http://www.eppo-project.eu).

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