

# Establishment of the European Public Prosecutor's Office

*Check against delivery*

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*After highlighting the reasons behind the need to establish a European Public Prosecutor's Office (EPPO), the author focuses on aspects that will characterize the future authority (independence, exclusive competence in the protection of EU financial interests, structure, functions, guarantees, impact on national authorities and EU institutions), and the as yet unpublished European Commission proposal for a Regulation.*

## INTRODUCTION

This has been a long reflection, which is coming to an end. Very soon, the Commission will make a joint proposal on the establishment of the European Public Prosecutor (EPPO) in the form of a regulation, accompanied by a proposal to reform Eurojust. This initiative follows an earlier announcement by the President of the Commission, Mr. Barroso, concerning the Commission's work plan in the rule of law area that the Commission would make such a proposal in the course of 2013. The emphasis on the establishment of the European Public Prosecutor's Office in accordance with the principle of the rule of law is significant.

## OBJECTIVE NECESSITY FOR THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE

The proposal on the establishment of the European Public Prosecutor's Office is an important political decision for the Commission. The Treaty contains the possibility to establish the European Public Prosecutor's Office, not an obligation. The need to set up such a European prosecution office is demonstrated by the Impact Assessment which is going to be made public very soon. It is evident that this may not be enough to convince everybody. As the Commission goes ahead with the proposal, it will have to engage in an intensive discussion with stakeholders by providing further arguments in support of its proposal, which comes at a time when the impact of the financial crisis is still being felt. In a financial crisis, when every penny counts, the Union needed to act. Our experience is that a lot of Union money gets lost every year. According to OLAF statistics, fraudulent irregularities amount to between € 400-600 million per year. Estimates provided in the Impact Assessment put this figure much higher, between € 3-5 billion per year. This figure has to be assessed against the background of the annual EU budget, which is roughly € 140 billion, meaning that about 3-4% of Union's annual budget goes squandered every year.

The European Public Prosecutor's Office should not only be viewed as a tool aimed at protecting better the EU's finances. It should become a milestone in the creation of a genuine area of freedom, security and justice – an objective set out

in the Treaty of Lisbon. If we succeeded with the project of the European Public Prosecutor's Office, the EU would reach another level of European integration. After the customs and, soon, the banking union, the EU would be coming closer to something resembling a judicial union. And in that area the European Public Prosecutor's Office will be an essential building block.

### **KEY ELEMENTS OF EUROPEAN PUBLIC PROSECUTOR'S OFFICE PROPOSAL**

The Commission's proposal on European Public Prosecutor's Office is built around a few key concepts, which I will seek to explain. In addition, it contains innovative ideas as concerns the relationship between the European Public Prosecutor's Office and the national authorities as well as and the link between European Public Prosecutor's Office and other EU bodies. To begin, the key concepts will be outlined.

#### **INDEPENDENCE**

Ever since the idea was put forward by academics, there have been calls to make the European Public Prosecutor's Office independent, knowing that national constitutional law does not always guarantee independence of the prosecution system. The European Court of Human Rights indeed has constantly reminded that the prosecutors need such independence in investigations. The Commission's proposal shares the same belief by providing that the European Public Prosecutor's Office should be fully independent and that its independence should be construed legally and institutionally so that no EU or national institution can interfere with its investigations and prosecutions.

Perhaps one point that clearly demonstrates why it should be fully independent is that the European Public Prosecutor's Office competence will not cover "ordinary" financial investigations. Its competence will cover investigations into fraud and related financial offences, such as corruption and money laundering. Recent cases at national and at EU level have also demonstrated the need to have a fully independent prosecution office, which only take instructions from its head. Therefore, according to the proposal, investigations will be conducted under the authority of the head of the European Public Prosecutor's Office, who will be answerable and accountable only to the EU institutions. The Commission will propose that the European Public Prosecutor, the head of this office, be appointed by the Council with the consent of the European Parliament; and that he or she be responsible for everything that happens in that office. Such appointment procedure comes with a certain number of consequences, including the possibility to remove the head of the office in case he or she no longer fulfills the criteria for the appointment or he or she has committed serious misconduct.

#### **COMPETENCE**

The Commission's proposal foresees that the European Public Prosecutor's Office will have exclusive competence over criminal "PIF offences". Its competence would be exclusive in the sense that the office will cover not only "cross-border" cases, but also "national" PIF cases. In other words, the European Public Prosecutor's Office will take over the responsibility which is now exercised by national

prosecution and law-enforcement authorities, to investigate and prosecute PIF offences, and it will aggregate that competence at the level of an EU office. PIF offences will be defined by a Directive, the so-called PIF directive, currently under negotiation in the Council and Parliament. The Council has just reached agreement (“general approach”) last week on the proposed directive, and we expect that the Parliament will, hopefully, start discussions on the proposed directive. Beyond that, the European Public Prosecutor’s Office will have an “ancillary” competence (accessory to its PIF competence), meaning that, subject of certain conditions, the European Public Prosecutor’s Office should be authorized to investigate also connected offences in “hybrid” situations, i.e. where a PIF offence is accompanied by a non-PIF offence. There will be several important conditions for triggering the exercise of ancillary competence: 1) the facts are identical; 2) these facts are inextricably linked; 3) the PIF element is preponderant (for example: if it’s a co-financed project, the EU subsidy is much larger than the national subsidy); 4) the national authorities waive their competence. In other words, ancillary competence is dependent on a consensus between the national authorities and the European Public Prosecutor’s Office that the latter takes over the investigation of the connected offence. If any of these conditions is not fulfilled, the case must go to national authorities. This is seen as a practical solution to the situation when PIF offences are indeed connected with other (non-PIF) elements, such as national fraud offence or a tax offence etc.

## STRUCTURE

The European Commission will propose to set up the European Public Prosecutor’s Office as a decentralized office. This doesn’t mean that everything should be done on the ground by local law enforcement authorities and prosecutors. The proposal foresees that the European Public Prosecutor’s Office will be a European office with a structure consisting of a central unit and local offices throughout the member States. Most decisions will be taken on the ground by the European Delegated Prosecutors, who will be the incarnation of the European Public Prosecutor’s Office in the member States, and who will act under the authority of the European Public Prosecutor. For example, the initiation of an investigation will be an autonomous decision of the European Delegated Prosecutors. The Commission believes that it is important to preserve the local connection, as crucial information often will come from national law enforcement authorities during investigations into a fraud-ring or a VAT Carousel. These offences may reveal a PIF element in the case. Thus, information triggering an investigation by the European Public Prosecutor’s Office is likely to come in most cases from national law enforcement authorities. In such situations the European Delegated Prosecutor should have the power to initiate investigations on behalf of the European Public Prosecutor.

In order to ensure efficiency of the European Public Prosecutor’s Office, there will have to be close coordination of activities with national authorities. Indeed, the European Public Prosecutor’s Office will become a pioneer institution as it will be moving away from the usual model of cooperation to a model of direct enforcement at European level. For this, the European Public Prosecutor’s Office will need certain powers to decide and instruct, as ultimately the European Public Pros-

ecutor must have a say whether the case does or does not deserve to be brought to court; whether indictment must be brought; and on the choice of jurisdiction. The Commission's proposal reserves these decisions to the central structure of the European Public Prosecutor's Office, which will take these decisions in consultation with the European Delegated Prosecutors involved in the case. The philosophy behind this approach is that ultimately the European Public Prosecutors has to bear responsibility for these decisions. The concept deriving from the Treaty is indeed that the European Public Prosecutor shall be responsible for investigating, prosecuting and bringing to judgment these offences. In the Commission's view, responsibility implies that a prosecutorial decision must be taken individually, not collectively.

The EPPO will be an integrated office in the sense that it will integrate all the functions which are involved in a criminal prosecution, from the first act of initiating pre-trial investigation until indictment and pleas in national courts. This approach is in full conformity with the broad powers foreseen by Article 86(2) of the Treaty on the Functioning of the European Union, which provides that the European Public Prosecutor's Office "shall be responsible for investigating, prosecuting and bringing to judgment ... the perpetrators of, and accomplices in, offences against the Union's financial interests" and "shall exercise the functions of prosecutor in the competent courts of the Member States". In practical terms, these powers will cover a wide range of prosecutorial and investigative functions, such as investigations, prosecutions, trial pleas, etc. The Commission's proposal will also contain a provision authorising the European Public Prosecutor's Office to conclude transactions, under certain criteria, with the suspect in minor cases.

## SAFEGUARDS

Another important element of the proposal on the European Public Prosecutor's Office is the robust guarantees for the rule of law. The European Public Prosecutor's Office will indeed exercise a certain number of powers and those powers need to be counterbalanced by procedural guarantees and other safeguards. The proposal provides that the European Public Prosecutor's Office should have access to various investigation powers ranging from witness interviews, interrogations, to search and seizure powers, telephone taps etc. Roughly half of these powers, which are coercive in nature, should only be used subject to a prior judicial authorisation by a national judge. The proposal provides that such *ex ante* control would be vested in national courts competent to oversee investigations and prosecutions at the national level. Member states, of course, would be able to maintain any additional guarantees which exist under national law.

In addition, as part of the safeguards, a catalogue of rights for the suspects and the accused persons involved in the European Public Prosecutor's Office proceedings will be created. This catalogue will build on the relevant *acquis* of the European Union, including the Directives on the right to interpretation and translation, on the right to information, as well as the upcoming directive on access to lawyer. The proposal will, however, go beyond these rights and anticipate the continuation of the roadmap on procedural rights by creating genuine European rights: for example, it will include the prohibition from self-incrimination for

the suspect involved in the proceedings and the right to legal aid (which is indeed one of the rights contained in the Stockholm roadmap as well).

The third essential element of the safeguards is that the European Public Prosecutor's Office will have to respect, in all its activities, the Charter of fundamental rights, including when it presents evidence to national courts. Therefore, should there be a violation of procedural safeguards, including those provided by the Charter, national courts should be free to declare such evidence inadmissible. In every other case, the evidence must be considered admissible at courts without further procedural certification, provided it was collected in accordance with the Regulation and the applicable national law of the State where it was obtained.

### ADDED VALUE

The European Public Prosecutor's Office should develop its own prosecution policy and move beyond the fragmentation of the current national prosecution policies. In that sense it should have its own view about the threshold of the cases that should go to court, including the degree of suspicion that is required for investigations and the quality and quantity of evidence required for bringing charges, as well as in which cases the court's decision should be appealed against. The proposal will set objective criteria for determining the choice of jurisdiction in cross-border cases.

Another aspect which may bring an added value is the concept of "European territoriality". It is a concept which has been there from the beginning, ever since the *Corpus Juris* and the recent Luxembourg Study have put forward certain model provisions. The concept of "European territoriality" the European Public Prosecutor's Office will require a change of mentality: it seeks to overcome the obstacles of national territoriality – a concept upon which national criminal justice systems are built. How do we move beyond that? We move beyond that by considering the European Public Prosecutor's Office as a single office which can exercise its powers throughout the member States, within the territory of which mutual legal assistance is no longer required. Given that the European Public Prosecutor's Office should act as an office throughout the EU (and therefore beyond single member States' territory), the EU would be for the European Public Prosecutor's Office a unique (indivisible) territory, within which the EPPO can exercise its powers autonomously. This will crystalize through the presentation by European Public Prosecutor's Office of evidence that may be collected in various States and irrespective of any differences between national rules concerning their collection and presentation.

Finally, the last key aspect. Article 86 of the Treaty on the Functioning of the European Union requires that the European Public Prosecutor's Office be established by means of a Regulation, which should clarify a large number of issues concerning the European Public Prosecutor's Office, including its structure, procedures, judicial control etc. However this Regulation should not become a European code of criminal procedure, as there are clear limits imposed by the Treaties in terms of proportionality and subsidiarity. The requirement of clarity and direct applicability for regulations would normally leave little room for national implementation. Nonetheless, this Regulation will leave a wide margin of discretion for national law, but national law can only apply if the Regulation leaves something unregulated. The

Commission's proposal will require the combined application of the Regulation with national law, on the understanding that national law can apply to the extent that it enables the effective application of the Regulation. The proposal will also contain a review clause, foreseeing that within a few years the practical implementation of the Regulation will be revisited, including possible problems in the functioning of the European Public Prosecutor's Office, with the aim to review the necessity of introducing further harmonisation in some areas. Yet, the aim of the review exercise will not be a creation of a detailed code of criminal procedure.

### **IMPACT OF THE PROPOSAL ON NATIONAL AUTHORITIES AND ON EU INSTITUTIONS**

The investigations of the European Public Prosecutor's Office will be conducted, in most cases, by national law enforcement authorities, as it is done today. Therefore, they will continue to remain in charge, but under the instructions and under the coordination of the European Public Prosecutor's Office. In that sense, there will be an ever closer integration of national law enforcement through direct EU law enforcement. The key position in all this system will be the "European Delegated Prosecutor" who will have a "double hat": he will come from national prosecution systems and will be appointed by the European Public Prosecutor on the basis of a selection made by the member States. European Delegated Prosecutors must have experience in national prosecution systems and must be appointed as active prosecutors in the member states, so that they can exercise their powers in both "systems": in the European Public Prosecutor's Office and in national prosecution system. European Delegated Prosecutors will coordinate between national prosecution systems and between the European Public Prosecutor's Office. All coercive powers must always be implemented by national law enforcement authorities under the instructions of the European Delegated Prosecutors, and any measures restricting fundamental rights must be subject to the control of the competent national judicial authorities.

Accountability will need to be ensured in political terms as well. The European Public Prosecutor will have to report every year about the Office's activities to the EU institutions and can also be invited by national parliaments to give account about its activities. In other words, there will be an indirect control by national parliaments over the activities of the Office.

As concerns the impact on the EU institutions, the most important aspect is the proposal's impact on OLAF and Eurojust. A certain number of administrative and management links between these bodies will have to be created; and yet these three bodies will have to remain separate. The proposal will foresee that the European Public Prosecutor's Office has a single, separate legal personality, but it will have a certain number of links to Eurojust, including operational coordination and sharing support services. The same principle will be echoed in the Commission's proposal on the reform of Eurojust. There will also be a provision on Eurojust involvement in determining jurisdiction.

Finally, a word about Europol, which is specifically mentioned in Article 86 of the Treaty on the Functioning of the European Union. This reference is a reminder of the importance of the information and analysis that Europol can provide to the

European Public Prosecutor's Office. Indeed, the analytical work files which Europol compiles may contain elements of PIF offences. Europol, like any other EU agency, will be required to report any potential PIF offences to the European Public Prosecutor's Office. It should also cooperate with the European Public Prosecutor's Office during investigations. The European Public Prosecutor's Office shall have the power to request further information from Europol and request analysis on connections with other cases or with organized crime groups etc. It is very important to enable the European Public Prosecutor's Office to request further information and analysis so that it can form a broader view about the investigation.

## CONCLUSION

Once the Commission's proposal is submitted to the European Parliament and the Council, negotiations will start in accordance with the special legislation procedure of Article 86. These negotiations will hopefully enable a broad compromise on the text so that the Union's financial interests can be better protected, throughout the European Union, thanks to a robust, efficient and independent European body called the European Public Prosecutor's Office. We should not spare our efforts before we achieve that goal.