

Conference on the Establishment of the European Public Prosecutor's Office (EPPO): "State of Play and Perspectives"

On 7 and 8 July 2016, the T.M.C. Asser Instituut hosted this conference which was organised by the Asser Institute and Leiden University, and financially supported by the European Anti-Fraud Office (OLAF). During the two-day programme, over 20 academic experts and practitioners shared their views and data on the progress of the EPPO project, animating a wide debate over the far-reaching, though difficult to implement, concept of EPPO.


FIRST DAY

Introductory remarks

In his key note speech, Prof. Dr John Vervaele (Utrecht University, President of the Association Internationale de Droit Pénal) highlighted the controversial issues surrounding the establishment of the EPPO. He raised questions in particular on the division of powers between EU Member States (Member States) and a new supranational institution entrusted with autonomous powers. He also provided reflections from the perspective of Member States, e.g. that the implied sharing of sovereignty ("*Vergemeinschaftligung*") is quite challenging in this particular area, even if it is not entirely a new phenomenon (cf. the European Securities and Markets Authority). In general, Member States prefer horizontal, intergovernmental modes of cooperation. Moreover, they are concerned that in due time new competences will, or have to, be awarded with regard to ancillary (or the so called "EU") offences and in the area of procedural criminal law. Despite these challenges, and the existing lack of research and empirical data regarding the features of the phenomenon and its magnitude, Prof. Dr Vervaele closed his opening remarks by highlighting the added values of a new EPPO.

Setting the scene: Panel session on the State of Play in the EPPO negotiations

After a video message from MEP Barbara Matera (European Parliament's rapporteur for EPPO), the Conference commenced with a panel session on the State of Play in the EPPO negotiations, with the aim of setting the scene for the Conference. The session was chaired by Mr Thom De Bruijn (Alderman of the City of The Hague and former Ambassador and Permanent Representative of the Netherlands to the EU). Representatives of the outgoing and current Presidencies of the Council of the European Union (the Council), The Netherlands and Slovakia respectively, shared their Government's efforts towards the establishment of the EPPO. Mr Marnix Alink (Legal Adviser to the Permanent Representation of the Netherlands to the EU) highlighted the impetus given by the Dutch presidency of the Council to the EPPO file, arising from a strong commitment to accomplish a successful presidency. A commitment shared by the current Council Presidency of Slovakia, as Ms Dagmar Fillova (Ministry of Justice of Slovakia) illustrated her Government's priorities regarding the EPPO (such as consolidating the draft legislative texts, the inclusion of judicial review and an in-depth study of EPPO's budgetary implications).



The work of the Dutch presidency was expressly commended by Mr Peter Csonka (Adviser of the Criminal Justice Directorate of the European Commission). Mr Csonka made clear that the European Commission (the Commission) will assess the final result cautiously: EPPO must be an independent, efficient Office providing added value, which is an European Union (EU) body effectively protecting the EU budget. According to him, the thorny issues around the EPPO project are a matter of finding the right balances between: (1) prosecuting powers and protective measures, (2) the powers of the central and delegated prosecutors, and (3) the powers of the Member States and the supranational prosecutor system. Mr Csonka concluded that the perspective seems to be positive and allows to expect that consensus will be reached in the Council and within the European Parliament (EP). Dr Wouter van Ballegooij (European Parliamentary Research Service) summarised the EP position on the matter. Although the EP will engage only in the EPPO's establishment through the legislative consent procedure, Mr van Ballegooij reminded of its competences in other legislative projects, such as the EP's budgetary powers, or the approval of the Directive on the fight against fraud to the EU's financial interests by means of criminal law (the PIF Directive). According to the EP there are three main factors that need to be safeguarded, which are the EPPO's effectiveness, the role of fundamental rights, and the material components of the EPPO. The EP will engage in a plenary discussion on the EPPO during its plenary session in September 2016.


First panel session: Possible assessment criteria

The first session of the Conference helped highlighting possible assessment criteria for the EPPO's establishment. The session was chaired by Dr Leendert Erkelens (Visiting Research Fellow at the T.M.C. Asser Instituut). Prof. Dr Ester Herlin-Karnell (VU Amsterdam) gave a detailed speech on the legislative framework in terms of 'Better Regulation', focusing on the importance of accountability and effectiveness of EPPO, and agreeing on the significance of a balanced solution between the need for a similar supranational Prosecutor's Office and the Member States' reluctance of transferring powers. Prof. Dr Herlin-Karnell noted that there is a difficulty of giving too much power to EPPO, because of the principles of proportionality and subsidiarity enshrined in the Treaties and in the draft regulation itself. Nevertheless, she stressed that if the final goal is uniformity, then only a strong EPPO would fit in the framework of the 'Better Regulation' agenda. The second panellist, Prof. Dr Valsamis Mitsilegas (Queen Mary University, London) addressed the issue from a constitutional point of view, giving important insights into the main Human Rights principles entailed in the legislative framework. He analysed the issue of Human Rights through three different lenses: procedural rights and the importance of minimum standards, the potential impact of the European Charter of Human Rights during EPPO proceedings, and the need to find a joint approach in cross-border cases in order to ensure the respect of Human Rights. Despite his positive and optimistic attitude towards EPPO, Prof. Valsamis raised criticism over the judicial control of EPPO, questioning the fact that EPPO would be under the judicial control of the Member States, and not of the Court of Justice of the European Union (CJEU). Lastly, Prof. Dr Holger Matt (J.W. Goethe Universität Frankfurt am Main) presented his views on the topic of EU constitutional principles and procedural safeguards as part of the rules of procedure for EPPO (Article 86(3) TFEU), stressing the importance of procedural safeguards that should be included in the EPPO legal framework. The main problem faced by the EU and its Member States, he argued, is not related to the quality of the law, but with its enforcement and, therefore, with the smooth functioning of criminal proceedings. Constitutional principles and procedural safeguards need to be effective in practice, in order to achieve a balanced system.

SECOND DAY

Second panel session: Substantive issues under EPPO's legislative framework

The second day of the Conference hosted the second, third and fourth panel sessions. The second session on the substantive issues under EPPO's legislative framework was chaired by Judge Ezio Perillo (Civil Service Tribunal, CJEU).



Prof. Dr Rosaria Sicurella (Università di Catania, IT) provided her reflections about the extent of EPPO's Criminal Law responsibilities in the light of the PIF Directive and the CJEU's Taricco Judgement. She highlighted how the Taricco Judgement, which many see as a political judgement, revived the negotiations, exercising an extraordinary, and somehow unusual, influence on them. She raised two main points arising out of the Taricco Judgement: firstly, the fact that every national issue, even if not harmonised, can get EU relevance if it affects a matter falling within EU law; and secondly, the effectiveness-driven approach followed by the CJEU in the Taricco case takes the Court to have a stand on the delicate issue of guarantees. The Taricco Judgement, she argued, affected prominently the discussion on the PIF Directive too, particularly the inclusion of VAT fraud. Nevertheless, Prof. Sicurella concluded that the developments in the PIF Directive are far from being satisfactory, since many of the Commission's proposals have been deleted or rephrased in a more concise manner during the negotiation process. Next, Mr Eric Sitbon (Legal Adviser, Council Legal Service) shared his views on the issue of ancillary crimes and *ne bis in idem*, analysing firstly the Commission's proposal, which aimed at including within the EPPO regulation offences that are inextricably linked to criminal offences. The extension of competences of EPPO, he pointed out, cannot be based on vague criteria (such as preponderance or good administration of justice) but it needs to be based on very clear criteria. Therefore, Mr Sitbon focused his reasoning on the new provisions of Article 17, which adds precise explanation of ancillary and inextricably linked crimes, and Article 20 (referring specifically to the difficulty of the 'preponderance' criteria in the exercise of competence) of the EPPO draft regulation, as modified in December 2015.

Third Panel session: Procedural issues under EPPO's legislative framework

The third session dealt with procedural issues under EPPO's legislative framework and was chaired by Dr Pim Geelhoed (Leiden University, the Netherlands). Prof. Dr Michiel Luchtman (Utrecht University, The Netherlands) gave a presentation on forum choice and judicial review under EPPO's legislative framework, highlighting the new challenges posed by Article 36 (judicial review by the CJEU) and the possibilities for a new system of court organisation under Article 86(3) TFEU. Prof. Luchtman stressed the importance of clear rules on forum choice, a relevant topic for the EPPO, for Member States, and for victims and defendants as well. He presented the example of Switzerland, in his view the country with the most advanced system of dealing with forum choices, which includes strong statutory rules that allow for deviations, places the onus of deviation from the statutory rules on the prosecution service, in which case the prosecution service has to justify the decision through four different criteria (interest of the suspect, interests of the victim, interests of the Courts, and speedy administration of justice). In Prof. Luchtman's view, this could be a valuable example for the EPPO as well. Dr Els de Busser (The Hague University of Applied Sciences, The Netherlands) analysed in her presentation the applicable law and admissibility of evidence in the EPPO's framework, noting how national and EU law tend to collide in the field of admissibility of evidence, and that mutual admissibility may not be the solution to the problem. Dr de Busser made an interesting comparison on admissibility of evidence between the original 2013 draft version of the regulation and its 2016 amended version. She noted how Article 31 rephrases, in more complex and broad terms, the admissibility of evidence. This article enhances mutual admissibility in general. However, in case of built-in checks by national authorities, this article provides for limited mutual admissibility with limited checks, based on fair trial rights, defence rights and other rights as enshrined in the Charter (e.g. the right to private life, the right to data protection, the right to liberty and security). This expanded framework of admissibility tests remains, nevertheless, a national issue, which poses serious questions about the development of the new concept of mutual admissibility.




Fourth panel session: Institutional issues under EPPO's legislative framework

The fourth session dealt with institutional issues under EPPO's legislative framework and was chaired by Prof. Arjen Meij (T.M.C. Asser Instituut and University of Luxembourg). Prof. Dr André Klip held a presentation on 'Internal Structure and Decentralised Decision-making', focusing on the issue of efficiency of an EPPO, criticising the probable length of the procedures and the problematic transparency for defiance and judicial review. He delivered criticisms on EPPO's internal structure, consisting of a single office with several different levels of governance and a decentralised structure. He argued that this complex organisation, as enshrined in Article 7, jeopardises clear lines of accountability and does not give clear indication about who will be responsible for what. Furthermore, Prof. Klip pointed at the well-established fact that Member States currently do not pay much attention to potential cases of EU fraud, and emphasised that the proposed EPPO equally lacks a triggering mechanism pushing national authorities to investigate potential cases of EU fraud, to collect information and to transfer the collected material (or evidence) to EPPO. His conclusion was far from enthusiastic about the proposed structure for an EPPO, suggesting that we may even be better off with the current system. Ms Irene Sacristán Sánchez focused her speech on 'Cooperation between the EPPO and the OLAF', emphasising the importance of a close collaboration between the two agencies as OLAF constitutes an important source of information on possible offences and could support the EPPO in the conduct of investigations and complementary action. The regulation, at the current stage of negotiation, is not clear on what kind of partnership will link the two bodies – mainly because of doubts and inconsistencies in the EPPO's framework itself. During the Dutch presidency, she argued, some results have been achieved, particularly with regard to the investigative support that OLAF can provide at the request of EPPO (Article 57(3) of the regulation). Prof. Dr Anne Weyembergh shared insights about the cooperative relations between EPPO and Eurojust in investigative actions, a special link that is found directly in Article 86 TFEU. Thereby she underlined that the EPPO should not be conceived as an isolated actor, but should be seen as part of a multi-level interaction, and that it shall enjoy a relationship with Eurojust based on their respective mandates. Furthermore, since Eurojust will continue to have competence on some offences included in the PIF Directive, the collaboration between the two institutions – which will be separated entities, with separated budgets – will be of the highest importance. Prof. Weyembergh explained that their cooperation should focus on both the institutional relationship and administrative links, as well as on their operational relationship.

Summa summarum: Assessing EPPO's raison d'être in the light of the debates

The concluding session of the conference helped to take stock of the two-day long discussion, in the form of a *Summa Summarum*. The panel session was chaired by Prof. Dr John Vervaele, and saw the participation of Mr Hubert Legal (Director General, Legal Advisor to the Council of the EU), of Prof. Dr Alex Brenninkmeijer (Member of the EU Court of Auditors and Professor at Utrecht University, The Netherlands) and of Mr Klaus Meyer-Cabri (National member for Germany at Eurojust and member of the Eurojust Task Force dealing with EPPO). In his introductory remarks, Prof. Vervaele raised many questions for the panellists, from the usage of enhanced cooperation to the added value of Article 86 (on establishing EPPO) compared to Article 85 (on Eurojust), from the difficult issue of having an independent authority with clear accountability lines, to the thorny issues of VAT fraud and efficiency of the project. Mr Legal highlighted the important steps forward made during the current Commission's mandate (after a few backlashes during the former one, which could have jeopardised the project itself), praising the hard work on the file by the different EU Council Presidencies. In his view, the EPPO project will get to be a functioning, important entity of the EU, with consequences going well beyond the mere protection of EU financial interests. If the EPPO will be seen as a matter of strengthening national authorities, rather than weakening their position, this will be a powerful example of how bundling of national efforts may strengthen EU cooperation.



Prof. Brenninkmeijer, on the other hand, criticised the nationalistic approach by Member States on the issue of EPPO, pointing out that the watering down of the EPPO's project is a consequence of this attitude, falling short of the too much neglected principle of loyal cooperation. According to him, the EPPO regulation is the best that can be achieved within the difficult and intricate decision-making process of the EU: this intensive project will have to resist the flood of the citizens' perspective, i.e., of Euroscepticism. Regarding the VAT issue, on which the EU Court of Auditors published recently an in-depth report, he lamented the lack of urgency to see VAT fraud as a European issue, and not as a national one. Prof. Brenninkmeijer stressed the real need for cooperation among Member States and at the EU level, highlighting the importance of the inclusion of VAT fraud into the PIF Directive. Mr Meyer-Cabri was asked to go deeper into the issue of the relation between Eurojust and EPPO. He emphasised that until yet the legislator has not provided a clear idea of the relation between the two institutions, swinging constantly between duties and cooperation possibilities. Furthermore, EPPO should have the chance to deeply use the precious services provided by Eurojust, much more than seeing it as a simple source of information, and taking advantage of the Eurojust capacities in many other cases, including cross border crimes. The relation between the two institutions is clearly also a matter of resources, of an equal distribution thereof.

The conference saw the active participation of over 80 practitioners and academics working on and researching questions related to the establishment of an EPPO.