

Shifting Perspectives on the European Public Prosecutor's Office

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Editors

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Foreword

*Parturient montes, ...*¹

The foreword to this second T.M.C. Asser Instituut volume on what should have been the first, non-intergovernmental, European body responsible for criminal investigations into large-scale fraud with regard to the Union's financial interests, must unfortunately begin, this time, with a sad remark.

After years of studies, green papers, reports and lectures and seminars held all over Europe, and after more than 3 years of intensive legislative work done in the context of a procedure involving the European Parliament, the Council and the European Commission (the so-called "special legislative procedure"), the "mountains" (i.e. the sovereign Member States), gathered far from public eyes in a room of the Council in Brussels (7 February 2017), have finally acknowledged the lack of required unanimity to adopt the regulation on the European Public Prosecutor's Office (EPPO). A quite predictable outcome, as several Member States, and not only one, expressed their concerns about such a proposal, and not all for the same reasons.

The European taxpayers and the autonomous legal order of one of the most important, united, economic inter-states realities in the world will therefore be deprived, for quite some time, of a European key instrument in the judicial configuration of the Union.

Even so, the EPPO is not yet officially dead.

During an informal meeting of the JHA Council in Malta, a few days before the above-mentioned European "surrender", seventeen Member States were said to be ready to carry on the project and to submit the proposal to the European Council, in view of establishing an enhanced cooperation allowing no less than nine Member States to have their own EPPO, so reported Věra Jourová, the Commissioner in charge of this file (see Agence Europe, 8.2.2017, N°11°720). It was 10 March 2017 when the European Council, due to the impossibility of reaching a consensus on the

¹ *Parturient montes, nascetur ridiculus mus.* (Horatius, *Ars Poetica*, v. 139). (*The mountains are in labor, [and] an absurd mouse will be born:* Merriam Webster Dictionary).

creation of a European Public Prosecutor, gave rise to the birth of *an absurd mouse*, as Horatius, the poet, would have said. A tiny and therefore weak EPPO, operating within a limited number of EU Member States, and which will therefore be even less able to investigate fraud in the sophisticated and border-free single market, where very efficient criminal organizations will probably play with this “fancy” EPPO, like the cat plays with a little mouse!

However, from the legislative point of view, the major downside to the foreseen enhanced cooperation procedure would be how to justify the EU democratic legitimacy of such an “intergovernmental” body. Indeed, according to Article 86(1) second indent, TFEU, if at least nine Member States wish to establish an enhanced cooperation on the basis of the draft regulation concerned, *they shall notify the European Parliament, the Council and the Commission accordingly [and] the authorization to proceed with enhanced cooperation ... shall be deemed to be granted*

This means that the EPPO legal text could be entirely put in the hands of a few Member States and adopted without any further substantial involvement of the Commission, the European Parliament or even of the Council. Such a result is probably not fully in line with the EU legality standards on criminal matters. Therefore, to avoid such a risk, it could be advisable, on one side, to adopt the regulation establishing the above-mentioned enhanced cooperation on the basis of the Commission’s initial legislative proposal, the only one which has already gone through the National Parliaments subsidiarity test. On the other side, due to the significant changes introduced by the Member States sitting on the Council, the Commission should submit, for the purposes of this particular enhanced cooperation, a public revised text of its proposal, to be then submitted to the European Parliament for consent before the final adoption by the Council.

According to the Treaty (see Article 20 TEU), enhanced cooperation means *to further the objectives of the Union, protect its interests and reinforce its integration process*. Establishing a Council’s “homemade” Public Prosecutor between, now, seventeen Member States could be, I guess, politically meaningful, but it does not correspond, in this case, to the very objectives of an enhanced cooperation. From such a perspective, it could even be preferable to put aside, for a while, this proposal and really reinforce Eurojust and OLAF, in order to better pave the way for a future, genuine EPPO.

An alternative option to this state of play could be to connect the role of the EU General Court with the EPPO’s activity.

Due to its recent December 2015 reform, the General Court of the European Union will be composed, by the end of 2019, of 56 judges, two for each Member State.

Could this new General Court be charged, within the legal structure of the Court of Justice (see Articles 86(3) and 263(4) TFEU), to review also the legality of EPPO’s procedural acts and/or to examine preliminary questions that national courts could raise before the Union’s judge (see Article 36(2) of the draft EPPO regulation)?

The time has probably come to look ahead towards an efficient European Prosecutor, operating in the entire area of freedom, security and justice, and not only in some Member States. All in all, a European Prosecutor who must be, as Viviane Reding and Robert Badinter have recently declared to *Le Monde* (27.10.2016), *European not only in name but also in acts*.

Be that as it may, this book, which collects the various contributions submitted by great EPPO experts, is exactly what is needed to properly understand all the nitty-gritty of the pending EPPO's proposal. Indeed, the draft text examined by these connoisseurs corresponds largely to the text finally "rejected" by the Council under the Maltese Presidency on February 2017, which could become the future text of the EPPO-enhanced cooperation.

My suggestion, if I may, would be to read each of these critical analyses bearing in mind the reasons why EPPO has been so far an unsuccessful European story. The reader will catch and appreciate all the legal and practical implications raised by these authors, and therefore be persuaded that what is nowadays needed by the Union and its citizens is an efficient European Public Prosecutor. A body which will not take away from the Member States a piece of their sovereignty, but which, on the contrary, will efficiently help these countries and the Union to fight against the currently increasing European scourge, i.e. fraud and corruption.

Luxembourg
April 2017

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² The opinions expressed here are strictly personal and under the sole responsibility of the author.

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