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NOTE

from: Presidency
to: CATS
Subject: European Public Prosecutor's Office: A Constructive Approach towards the Legal Framework
Conclusions of the conference organised by the Lithuanian Presidency in cooperation with the European Commission and the Academy of European Law (Vilnius, 16-17 September)
- Information by the Presidency

The conference "European Public Prosecutor's Office: A Constructive Approach towards the Legal Framework", organised by the Lithuanian Presidency of the Council of the European Union in cooperation with the European Commission and the Academy of European Law, was held in Vilnius, Lithuania, on 16-17 September 2013.

More than 130 experts, including representatives from the Member States, the Council General Secretariat, the European Commission, the secretariat of the LIBE Committee of the European Parliament, the European Court of Justice, OLAF, Eurojust, Europol, European Data Protection Supervisor, European Criminal Bar Association, practitioners and academics took part in the conference.

The objective of the conference was to reflect on the framework of the European Public Prosecutor's Office (EPPO), as proposed by the European Commission. The discussions focused on the three main aspects of the proposal:

- the institutional setting
- procedural regime
- material scope of competence of the future EPPO.

The conference and the discussions are expected to serve as an impetus for the Member States to initiate constructive discussions regarding the establishment of the EPPO.

The opening session began with welcome speeches by the Lithuanian Minister of Justice Juozas Bernatoniš, the Commissioner Algirdas Šemeta, in charge of taxation and customs union, audit and anti-fraud, and the Lithuanian General Prosecutor Darius Valys. Minister of Justice Juozas Bernatoniš underlined that the proposal on the establishment of the European Public Prosecutor's is one of the priorities of the Lithuanian Presidency of the Council of the EU in the criminal justice area. He noted that new and effective ways to fight crimes affecting the European Union's financial interests are definitely needed; however, they must be well considered, and Member States should be given sufficient time for discussions on this issue. Commissioner Šemeta highlighted that the proposal has been presented after thorough consultations with Member States, the European Parliament, as well as legal practitioners and other stakeholders. General Prosecutor Valys underlined that further analysis is needed and that it would at this stage of negotiations be worthwhile to have regard to the opinion of practitioners as regards the proposal.

The debates were introduced by a presentation of the main points of the proposal by Françoise Le Bail, Director General for Justice in the Commission, and Giovanni Kessler, Director General of OLAF, and then followed by three main sessions dealing with institutional setting, procedural regime and material scope of the EPPO. In the first session on the institutional setting of the EPPO, the following subjects were discussed: Relationship with relevant EU agencies or bodies, Relationship with EU institutions and Relationship with national authorities. In the second session, on the procedural regime of the EPPO, Investigation and Prosecution, Admissibility of evidence, Protection of Defence rights and Personal Data Protection were discussed. The final session, on the material scope of the EPPO, focused on the EPPO's competence to prosecute offences affecting the EU's financial interests, the impact of the future PIF Directive, and the possibilities for the EPPO to prosecute other serious crimes.

The conference showed that participants are open to reflect on various aspects of the proposal to establish an EPPO. Interesting discussions were held and ideas exchanged on the proposed framework of the EPPO, but many questions which were raised will need to be further analyzed.

The conference closing remarks were presented by the Commission Director for Criminal Justice Lotte Knudsen and the CATS Chair Darius Žilys. Ms Knudsen underlined that the decentralised and integrated EPPO model with a double hat system has been chosen for reasons of efficiency and independence in prosecuting PIF crimes. She noted that some Member States raise certain issues and questions on the chosen structure, but the project is on the table for discussions and for finding the ways forward. Mr Žilys concluded that the discussions show a great interest in the proposal, but that there is a lot of work ahead, to develop ideas and to clarify new questions raised. The comments by academics and practitioners merit attention. In order to achieve the required unanimity on the proposal, the negotiations on this very important issue should be conducted comprehensively, and sufficient time should be devoted to deliberate upon all aspects of the proposal, including at experts' level. The EPPO should be operable in the vast majority of Member States or at least as many as possible.

Delegations will find a more detailed report from the conference in attachment.

CONFERENCE**“EUROPEAN PUBLIC PROSECUTOR’S OFFICE:
A CONSTRUCTIVE APPROACH TOWARDS THE LEGAL FRAMEWORK”
VILNIUS, 16-17 SEPTEMBER 2013
REPORT**

1. INTRODUCTION

The conference “European Public Prosecutor’s Office: A Constructive Approach towards the Legal Framework”, organised by the Lithuanian Presidency of the Council of the European Union in cooperation with the European Commission and the Academy of European Law, was held in Vilnius, Lithuania, on 16-17 September 2013.

The objective of the conference was to reflect on the framework of the European Public Prosecutor’s Office (EPPO), as proposed by the European Commission. The discussions focused on the three main aspects of the proposal:

- the institutional setting
- procedural regime
- material scope of competence of the future EPPO.

The conference and the discussions are expected to serve as an impetus for the Member States to initiate constructive discussions regarding the establishment of the EPPO.

The opening session included welcome speeches as well as presentations of the main points of the proposed legal framework of the EPPO. This was followed by the first substantive session dealing with institutional setting of the EPPO. On the second day, the discussions continued with the second session, on the procedural regime of the EPPO, and the third session on the material scope of the future EPPO. The conference closed with general conclusions on future perspectives.

More than 130 experts, including representatives from the Member States, the Council General Secretariat, the European Commission, the secretariat of the LIBE Committee of the European Parliament, the European Court of Justice, OLAF, Eurojust, Europol, European Data Protection Supervisor, European Criminal Bar Association, practitioners and academics took part in the conference.

2. OPENING SESSION

The opening session began with welcome speeches by the Lithuanian Minister of Justice Juozas Bernatoniš, the Commissioner Algirdas Šemeta, in charge of taxation and customs union, audit and anti-fraud, and the Lithuanian General Prosecutor Darius Valys.

Mr Juozas Bernatoniš, Minister of Justice of Lithuania, underlined that the proposal on the establishment of the EPPO is one of the priorities of the Lithuanian Presidency of the Council of the EU in the criminal justice area. He noted that new and effective ways to fight crimes affecting the European Union's financial interests are definitely needed; however, they must be well considered, and Member States should be given sufficient time for discussions on this issue. The Minister further noted that the international conference is aimed at an informal overview of the content of the proposal on the establishment of the EPPO and sharing ideas on the proposed legal framework of the EPPO among the experts from the EU Member States and EU institutions and agencies. During the conference it is also expected to receive comments and remarks from prominent representatives of the academic society. According to Justice Minister Juozas Bernatoniš, the conference and the comments provided are expected to serve as an impetus for the Member States to initiate constructive discussions regarding the establishment of the EPPO.

Mr Algirdas Šemeta, Commissioner, underlined the importance of the proposal to establish the EPPO in the light of the current very difficult economic times. The commissioner further emphasized that suspected fraud to the EU budget amount to about €500 million each year and the victims of this fraud are the European taxpayers. He further highlighted that the proposal has been presented after thorough consultations with Member States, the European Parliament, as well as legal practitioners and other stakeholders, and after carrying out a comprehensive impact assessment. Further, the Commissioner introduced the main characteristics of the EPPO proposal:

- the EPPO will have exclusive competence to tackle crimes against EU funds at every step of the process, i.e. where a criminal offence affects the EU financial interests, the EPPO will be competent for dealing with it, regardless of whether national financial interests are also involved. This will ensure a clear separation of tasks and avoid duplication of work between national and Union bodies. The separation of tasks in mixed cases will be based on a weighing exercise. The EPPO will be competent if the offence against the EU financial interests is the most significant factor in the offence. This will be determined in consultation with national authorities.
- the EPPO will need to be able to employ a sufficient range of investigative measures throughout the Union, which are clearly set out in the proposal and will be subject to prior judicial authorisation as well as judicial review by national courts. They correspond to what national prosecutors can already do today, such as searching property and computer systems, freezing assets, and questioning suspects. The investigation results will be valid in Courts of Law in all Member States. Evidence which the EPPO lawfully obtains in one Member State will be admissible without further validation in all other Member States. Also, the proposal foresees safeguards for the rights of the persons concerned by an investigative measure.
- the EPPO will be independent, as this is crucial for its impartiality and professionalism. The independence will be based on the rules of appointment and dismissal as well as on a non-renewable mandate. The EPPO will report to EU institutions on its general activities, priorities and results.
- the EPPO will have a decentralised structure, as this is the best way to integrate the new body seamlessly in the national systems and to build on expertise which already exists there. The EPPO's main work on the ground will be done by "double-hatted" European Delegated Prosecutors, based in the Member States. These are national prosecutors who will continue to work with their "national" hat, but will give first priority to wearing their "European" hat. For fraud cases affecting the EU budget, they will be instructed by the EPPO, but nevertheless work within a system that is familiar to them. The European Public Prosecutor in person will be supported by a "head office", which will also provide the link between Delegated Prosecutors across Member States.

- the EPPO will be created on the basis of experience and resources of OLAF and Eurojust. Eurojust's administration will support the EPPO, notably on human resources, finance and I.T. The EPPO staff will come mostly from OLAF, which itself can be pared down in size. OLAF will no longer investigate criminal cases but will keep an important share of competences outside the EPPO's remit. For instance, it will continue to investigate irregularities affecting EU funds, and serious misconduct or crimes committed by EU staff without impact on the EU budget.

Mr Darius Valys, General Prosecutor of Lithuania, noted that due regard should be given to the practical operation of the proposed EPPO at national level, as was noted at the Meeting of the Consultative Forum of Prosecutors General and Directors of Public Prosecutions of the Member States of the European Union, organised by Eurojust on 26 April 2013, as well as at the EU General Prosecutors' Network meeting in Krakow this year. If the proposed model of the EPPO was adopted, it would have a direct influence on the national prosecution offices. Without doubt, it will be necessary to further analyze national laws, organizational changes needed in the existing structures of the prosecution offices and whether there is a need for additional human and financial resources. The prosecutors must be trained on how to deal with this category of criminal cases and on how to organise efficient cooperation with international colleagues on cross-border cases. Mr Valys underlined that it would at this stage of negotiations be worthwhile to have regard to the opinion of practitioners – judges, prosecutors, investigating officers – who are working with the cases touching upon the Union's financial interests in various Member States.

Ms Françoise Le Bail, Director General of the Directorate-General for Justice, European Commission, highlighted that there is a need for the EPPO which has to be efficient and independent EU body which needs to be well integrated in the MS as required by the Article 86 TFEU. There is a number of MS advocating in favour of the college model. The Commission reflected upon different types of the future EPPO governance structure and does not see the college as a suitable model due to the strong need of independence and efficiency of the EPPO. The example of a college structure is Eurojust, but Eurojust is the EU agency with the functions of coordination and facilitation to national judicial authorities which retain their competences to investigate and prosecute. The EPPO, on the other hand, is the EU body which will be responsible for investigation and prosecute on its own. If the decisions to be taken by the EPPO need to be subject to college validation, this will affect significantly the independence and efficiency of the Office. The governance structure should not allow the national interests to overweight the European one. Nevertheless, the Commission sees the added value of assembling the central and the decentralised level in a mini college encompassing the European Public Prosecutor, his four deputies and five European Delegated Prosecutors. This mini college will have power to decide the internal rules of the Office and the rules on the allocation of cases but will not be vested with powers to take operational decisions.

Further, the appointment procedure must also guarantee the independence of the EPPO. The Council and the European Parliament, as the two arms of European budgetary authority and the European Commission as responsible for the implementation of the budget, are best place to decide on the appointment of the European Public Prosecutor and his/her four Deputies. This procedure will guarantee sufficient level of legitimacy and independence. The EPPO should be accountable to these three institutions. The appointment of the European Delegated Prosecutors (EDPs) on the other side should reflect their “double-hatted” status and seeks to ensure the best balance between the integrity and acceptance from both sides. Ms Le Bail also noted the importance of checks and balances which ensures democratic control over the EPPO activities and guarantees the highest professional standards for the EPPO. The Director General raised concerns regarding the guarantees for EPP's independence in case of he/she would be elected by the college without participation of the European Parliament. Ms Le Bail also underlined that the European Delegated Prosecutors (“double-hatted” prosecutors) will be integral part of the EPPO while being embedded into the national justice systems. This will allow the EDPs to function in a familiar legal and institutional framework.

The exclusive EPPO competence has a major operational advantage and will avoid parallel jurisdictions and investigations. This is a clear setting, aiming at a better cooperation and steering while relying on the national authorities. The EPPO will be competent to investigate and prosecute EU fraud as provided for by the proposed Directive on the protection of the EU financial interests. The ancillary competence of the EPPO on the non-EU fraud crimes is subject to strict conditions and agreement of the national prosecution authorities. Its purpose is better administration of justice and should not be seen as an attempt to circumvent the treaty provision on the possible extension of EPPO competences to serious and cross-border crime.

With respect to investigative measures, the Commission proposed a combination of EU national rules. The proposal contains a catalogue of investigative measures which will be at the disposal of the EPPO throughout the territory of the EU Member States. This will ensure uniform protection of the financial interests of the EU. The most intrusive measures will be always subject to prior judicial authorisation. The proposed investigative measures exist already to a large extent in the national legal frameworks with some discrepancies which will need to be overcome for the sake of efficiency and uniform protection. The conditions for the application of the investigative measures and the procedural rules for the trial phase will be those of the Member States of the trial.

Also, the proposal foresees an important provision on the admissibility evidence which will allow overcoming the current difficulties in this area. Another important aspect of the proposal is the set of procedural safeguards which ensure that suspected persons can benefit from a number of guarantees. The Union has adopted a number of legislative measures in this area and they have been referred to in the proposal.

Ms Le Bail concluded that the EPPO is being created for fighting criminality and not for the sake of creating another EU body. It will be an efficient body with a degree of integration. This proposal has been discussed for more than 10 years and the Commission came up with a model which can work in practice, which is balanced and respectful to national judicial authorities.

Mr Giovanni Kessler, Director General of OLAF, European Commission, underlined that the aim is to set up a European body but there are two core aspects to be discussed – political and technical.

The political aspect stems from the fact that the interests at stake are European interests and that the protection of these European interests depends on national authorities and their willingness and ability to fight criminality in this very specific area. However, often the interest of national authorities to protect European interests is far too low. In order to overcome this problem there is a need for a balanced and consistent approach to fight crimes against the financial interests of the EU and a response to this need is the setting up of a truly European body. On a technical level, there is a need to overcome outdated and fragmented approaches within criminal investigations of transnational character, when the cases cannot be dealt with effectively at a national level.

Mr Kessler concluded that the EPPO is a milestone in the Area of Freedom, Security and Justice. The EPPO proposed is of a typical hierarchical structure with integrated national systems and it does not have the purpose to facilitate or administer justice like Eurojust or OLAF. It will be an office with powers to carry out criminal investigations, to decide upon criminal indictment and to bring cases before the national courts. Mr Kessler expressed his opinion that a college is not an office, because the college is a structure where the representatives from several authorities sit together to facilitate the exchange of information and coordination. Only the structure of an office can ensure a clear allocation of responsibilities and a clear division of powers.

In his final remark Mr Kessler noted that the EPPO provides an integrated model created on the basis of the subsidiarity principle and which will be composed of national prosecutors. It therefore will provide an efficient system to fight the crimes against financial interests of EU.

3. SESSION I: INSTITUTIONAL SETTING OF THE EPPO

3.1. Relationship with relevant EU agencies or bodies

Chair: *Mr Peter Csonka, Advisor, Criminal Justice, DG Justice, European Commission*

Speakers:

Ms Michèle Coninx, President of Eurojust

Mr Lothar Kuhl, Head of Unit D.1 – Policy Development, OLAF, European Commission

Mr Dietrich Neumann, Head of Business Area Corporate Services, Europol

Mr Peter Csonka emphasized that Article 86 TFEU provides for the establishment of a new body, but with strong relations with other EU institutions, and briefly outlined the main articles of the proposal concentrating on these relationships.

Firstly, Mr Csonka pointed at Article 13(2) which refers to Eurojust's role of facilitator in the determination of the ancillary competence of the EPPO. Article 57 includes provisions on the relationship between the EPPO and Eurojust. The provisions also provide for operational, administrative, management links between the EPPO and Eurojust. For example, a regular exchange of information and assistance of Eurojust when it comes to cooperation with MS which are not participating in the EPPO, eg. Denmark, or involves cases containing related offences but falling outside the exclusive competence of the EPPO. Also, the provisions provide for a consultative role of Eurojust on issues of indictment and prosecution. Finally, the provisions of Article 57 touch upon the cooperation with third countries via Eurojust, for example, when subsidies are spent somewhere in Africa by non EU nationals and investigation therefore can only be proceeded by the third country's national authorities.

Mr Csonka further highlighted the provisions on the relationship between Europol and the EPPO. Article 15 foresees an obligation to Europol to report suspicious cases to the EPPO. Article 58 also provides for a safeguard of purpose limitation which means that the information provided by Europol can only be used for the purpose of investigating and prosecuting within the EPPO competence only. Article 21 contains provisions on the obligation of Europol to draw analytical report in order to support a specific investigation by the EPPO. The third relevant EU body, OLAF, is not specifically mentioned in the text, but clearly has a strong interest in the future EPPO. OLAF has an obligation, like any other EU agency, to provide information to the EPPO on suspicions concerning the EU financial interests. Recital 27 also refers to an obligation to assist the EPPO where necessary with preliminary assessment of reports coming from the institutions. Article 21 and Recital 41 foresee a possibility for OLAF to provide the EPPO with analytical support. In accordance with Article 28, the EPPO may refer dismissed cases to OLAF. Finally, the provisions under Article 58 also foresee the conclusion of a cooperation agreement between the EPPO and OLAF.

In her general introduction, *Ms Michèle Coninsx* highlighted that the wording of Article 86 TFEU, spelling out that the EPPO should be established “from Eurojust”, already implies that the relationship between the EPPO and Eurojust is of essence and that the proposals for regulations on “lisbonising” Eurojust and on the establishment of the EPPO are very much interlinked. The Commission has initiated a reform that, besides the creation of the EPPO, also aims at further strengthening Eurojust. The reform is proposed as a package and the intention of the Commission to bring the two reforms in parallel is obvious. Consequently, the two drafts must ideally be read and developed in the negotiations in parallel with a view to ensuring complementarity of competences, using the same terminology and enabling operational interaction in a common approach to protect the financial interest of the EU more effectively.

Ms Coninsx presentation then focused on the respective scope of competence of the EPPO and Eurojust, the operational cooperation between them and the administrative support that Eurojust may offer to a future EPPO.

In respect of the competences, Ms Coninx underlined that further clarification is needed on the articulation of competences of the EPPO and Eurojust in the field of crimes against the financial interests of the Union. Eurojust's competence should be adapted in order for these EU actors to complement each other without diminishing the core mission of Eurojust – that is supporting and strengthening cooperation and coordination upon request and when needed. As the EPPO will act within a limited scope, Eurojust will have the new task of avoiding any gaps in the judicial cooperation system. Therefore, the necessity arises to consider how to deal with connected crimes, where suspects of crimes affecting the EU's financial interests are involved in other serious transnational crimes falling outside the sphere of competence of an EPPO. Also, Eurojust's role in facilitating the agreement on the determination of the ancillary competence between the EPPO and the national prosecution authorities is clearly recognized in the draft EPPO Regulation (Article 13 and 57c) and should be mirrored in the Eurojust Regulation. The draft EPPO Regulation provides for the possibility for the EPPO to associate Eurojust with its operational activities concerning cross-border or complex cases in respect of those aspects which fall out of the EPPO competence. However, Eurojust role may be further clarified and enhanced in this field. Moreover, if the EPPO was established through enhanced cooperation, the coordination of its actions with the national authorities of MS which are not participating in the EPPO should rest with Eurojust and this should be reflected in both proposals. Finally, both proposals provide for the possibility for concluding working arrangements with third countries and international organisations and to designate contact points to third countries. However, the EPPO could certainly benefit from the working relationships with partners and third States already developed by Eurojust.

In respect of operational cooperation, Ms Coninx emphasized that the centralisation of the investigation and prosecution of PIF crimes conveyed by the wording of Article 86 TFEU suggests that the EPPO will have a vertical set up which should complement and build on the collegial and horizontal manner in which Eurojust works with the national authorities in MS, i.e. using ENCS, relying on the National Members of Eurojust and employing such tools as OCC, JITs, CMS and information gathered by Eurojust.

Regarding administrative support, Ms Coninx noted that effectiveness and cost-efficiency would be ensured by the setting-up of an infrastructure ensuring close ties with Eurojust, but the establishment of the EPPO should not result in a transfer of resources to the detriment of Eurojust. According to the draft Eurojust Regulation, Eurojust is expected to assist the EPPO through support provided by its staff in basically all fields related to the functioning of the body on a zero cost basis. This important involvement and responsibility of Eurojust in the functioning of the EPPO might raise the question of the resources granted to Eurojust to carry out its missions.

Ms Coninx also raised the question of the seat of Eurojust, referring to a “special relationship” between the EPPO and Eurojust which entails that both EU bodies should function under the same roof.

In her conclusive remarks, Ms Coninx underlined that in order to avoid discrepancies and improve synergies between all involved national and EU actors, coherence is the key element for a constructive approach towards the legal framework for the EPPO and its relationship with Eurojust.

Mr Lothar Kuhl in his introductory remarks noted that OLAF was established in 1999 as a specialized independent investigative service of the EU to combat fraud within the institutions and in MS. A revised legal framework will enter into force on 1 October 2013 which will reinforce cooperation with MS authorities, accelerate the information flow, strengthen procedural guarantees and clarify institutional governance.

Mr Kuhl further expressed his views on the role of OLAF in the setting up of the EPPO. First of all, OLAF has a mandate based on Article 325 TFEU which aims at protecting the financial interests of the Union and which is also a core mandate of the future EPPO. Therefore, existing dedicated expertise and infrastructure of OLAF should be exploited and the EPPO should be built on the existing capacities at a European level. Secondly, OLAF is entrusted with an administrative investigative mandate. The added value of OLAF comprises its direct cooperation with national judicial authorities concerning facts which could give rise to criminal proceedings. The cases and the investigative experience of OLAF have been an important basis for the development of the proposed EPPO model. The staff of OLAF is composed of experts with a criminal investigative and judicial background. Therefore, for cost limitation and efficiency, the current OLAF’s resources will progressively and gradually be invested into setting up the EPPO.

In the immediate future, OLAF will implement its new regulatory framework replacing Regulation 1073/1999. However, as it is foreseen by Recital 50 of the new OLAF Regulation, the European Commission will assess the need for revision of this Regulation in the event that the EPPO is established. The EPPO is the final step of a set of systemic improvements.

Further, Mr Kuhl focused on the role of OLAF once the EPPO is set up. Firstly, OLAF will no longer conduct investigations within the domain of exclusive EPPO competence. Many of the current OLAF investigations would no longer need to be initially opened as administrative investigations. This should improve the use of human resources and accelerate investigations and prosecution. As provided by Recital 13 of the EPPO proposal, all EU bodies, including OLAF, are obliged to actively support the EPPO in the exercise of its investigative mandate and Recital 26 further indicate that the EPPO investigations should be facilitated by EU bodies, including OLAF. Also, Recital 27 provides for the continued use of currently existing reporting procedures and mechanisms in place for preliminary evaluations reported to OLAF by EU institutions. However, subject to Article 16, the EPPO would assess under its own authority whether there are reasonable grounds to believe that an offence within its competence has been committed. Mr Kuhl also underlined the provision under Article 58(3) that the EPPO will cooperate with OLAF to implement Article 325 TFEU. Also, in accordance to Article 28(3), the EPPO may refer cases dismissed by it to OLAF or to the competent national administrative or judicial authorities for recovery or other administrative follow-up. It was further noted that OLAF's inter-institutional mandate extends beyond PIF violations. Finally, there might be a residual need to continue implementation of the administrative investigative anti-fraud framework if, in case of enhanced cooperation, there will be Member States in which the EPPO will not have competence to conduct investigations.

Mr Kuhl summarized that the experience and resources of OLAF are a cornerstone in the setting up of the EPPO and a specific need for a continued OLAF depends on the conditions under which EPPO will operate, its exclusive competence and whether the EPPO will be set up by enhanced cooperation.

Mr Dietrich Neumann presented the main issues related to the relationship between the EPPO and Europol. In general, Mr Neumann highlighted that the role of Europol towards the EPPO is less prominent than the ones of Eurojust or OLAF. The role of Europol towards the EPPO is foreseen to be of supportive nature, and the relationship between the two EU bodies would be based on the principle of complementarity. The competence of the EPPO and the number of participating MS will be important elements as regards the cooperation between the EPPO and Europol.

In general, Europol has a mandate to become active in organized and serious crimes where two or more MS are involved and its main functions are to provide information and analytical support. With respect to provision of information, Europol will only have a duty to provide the information within the limits of the EPPO competence based on “purpose limitation”. Therefore, the EPPO competence in PIF crimes should be defined with more clarity.

Europol has extensive expertise in Analysis Work Files, in Joint Investigation Teams (JITs) ("joint teams" being established by the EPPO as provided by the draft Regulation, should not be equated with JITs), it has unique and developed network of liaison officers, including liaison officers from third countries. Therefore, Europol surely is able to support EPPO with all the expertise obtained. Also, in light of temporary work files, established by the EPPO, and analytic work files, conducted by Europol, it is important to make sure that Europol and the EPPO do not duplicate their functions. Mr Neumann concluded that the relationship between the EPPO and Europol will also be defined by the number of participating MS.

3.2. Relationship with EU institutions

Chair: *Ms Alexandra Jour-Schroeder, Head of Unit, DG Justice, European Commission*

Speakers:

Mr Hans G. Nilsson, Head of Unit 2B – Fundamental Rights and Criminal Justice, General Secretariat, Council of the European Union

Mr Lars Bay Larsen, Judge at the Court of Justice of the European Union

Marianne Wade, Senior Lecturer, Birmingham Law School

Ms Alexandra Jour-Schroeder introduced the topics of the session, highlighting that while the EPPO is independent, the draft Regulation takes due account of its important relationship with EU institutions e.g. with regard to accountability, appointment and budgetary procedures.

Mr Hans G. Nilsson presented the relationship between the EPPO and the Council of EU as well as the European Council, emphasizing that the enhanced cooperation is a key issue at stake.

Firstly, he briefly underlined the special legislative procedure provided by Article 86 TFEU, under which the EPPO Regulation has to be adopted by unanimity after obtained consent by the European Parliament. The procedure under Article 86 TFEU may also involve the European Council, as there is a possibility to invoke enhanced cooperation subject to Articles 20 TEU and 86 TFEU as well as Articles 326 – 334 TFEU. Article 86(1) TFEU requires adoption by unanimity, which will be extremely difficult to achieve. There is no doubt that the more MS would participate in the setting up of the EPPO, the better it would be for its credibility. Hence, 15-16 MS is a much better number than the minimum number of 9 MS which is required for invoking enhanced cooperation.

Article 86(1) TFEU further provides that *“In the absence of unanimity in the Council, a group of at least nine Member States may request that the draft regulation be referred to the European Council. In that case, the procedure in the Council shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council for adoption.”* This provision raises a lot of questions. Mr Nilsson provided some personal remarks on the following aspects:

First, the notion of “unanimity” raises questions on issues such as at what level unanimity should be reached, when and on what basis. Subject to the provisions of the Treaty, it is clear that it has to be done at the level of the Council and not at any lower level. With respect to the question of “when” – some difficulties linked to the anticipated rapid decision-making process can be foreseen, although such a rapid process would not seem to be in line with the rest of the Treaty. Questions also arise regarding the basis on which a conclusion that there is no unanimity shall be drawn, or more particularly: which “draft Regulation” shall be referred to the European Council? Would this be the text as proposed by the Commission or an already negotiated text?

Second, as regards the notion of “consensus”: what is the consensus that the European Council should reach? It is certainly not unanimity on the content of the text, but rather according to the normal way of procedure in which the European Council makes decisions. It may well happen that 15 MS in the European Council accept the draft Regulation, whereas the rest would not be in favour of the text on the table. In general, this will not be solved by a vote. It may also happen that the MS which do not participate in the negotiations of the proposal in the Council may have a say in the European Council. For instance, DK which is outside the JHA cooperation, and UK and IE if they did not opt in, they would nevertheless all have a say at the European Council.

Furthermore, Article 86(1) provides that *“Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft regulation concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.”* This is the so-called accelerator clause which implies that the regular applicable procedures in the framework of enhanced cooperation do not apply. However, this provision also raises many other questions:

First, the notion of “disagreement“: the question is if this refers to the level of the Council of EU or to the level of the European Council? Mr Nilsson opined that it refers to the level of the European Council.

Further, there might be procedural complications if there is a required number of 9 MS who wish to proceed with enhanced cooperation but suddenly 1 MS withdraws.

Another procedural issue lies in the context of the notification which has to be done after the term of 4 months. If this notification is done later than the determined period of time, would it have the implication that the whole procedure expires?

Moreover, Article 86 TFEU has an explicit reference to Article 20(2) TEU which provides that “*The decision authorising enhanced cooperation shall be adopted by the Council as a last resort when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole, and provided that at least nine Member States participate in it.*” Therefore, enhanced cooperation may only be invoked as a last resort, as was held by the CJEU in the *Unitary Patent* case in which the Court placed an emphasis on a provision under Article 20(1) TEU that “*enhanced cooperation shall aim to further the objectives of the Union, protect its interests and reinforce its integration process.*” In consequence, as explained in the Advocate General opinion, the expression “at a last resort” highlights the fact that only those situations in which it is impossible to adopt a piece of legislation in a foreseeable future may give rise to a decision authorising an enhanced cooperation. This also applies to the special enhanced cooperation procedure. Accordingly, there is an obligation to negotiate the proposal in the Council and it is not possible to immediately invoke enhanced cooperation without any further discussions.

Besides, if we follow the “4 months procedure” and we fail, it does not mean that we cannot do it again. As for example, the provisions in Article 48 TFEU provide for enhanced cooperation in the field of social security and they explicitly indicate that the enhanced cooperation may not be invoked several times, whereas Article 86 TFEU is silent on this.

Mr Nilsson also underlined that subject to the provisions of EU Treaties, MS participating in the enhanced cooperation have to respect competencies, rights and obligations of non-participating MS but there is also an obligation on the non-participating MS not impede its implementation by the participating MS. Also, it should be noted that once the enhanced cooperation has been invoked, it is open to all MS, but they have to abide to the *acquis* of the enhanced cooperation. Further, there is a strong role of the Commission once enhanced cooperation is in progress. Moreover, there is also a provision providing for an obligation for the Council and for the Commission to ensure consistency of the policy within the Union and the question arises on how this should be ensured and whether provisions on this should be included already in the Regulation?

Mr Nilsson concluded that if enhanced cooperation took place, it would lead to even a greater number of questions.

Mr Lars Bay Larsen underlined that he will present personal remarks on the issue of judicial control of the EPPO on the background of the Commission proposal. In the introductory remarks, he emphasized that there is neither a general European Penal Code, nor a general European Penal Procedural Code, nor a system or structure of European Courts dealing with European/”Federal” Offences. It seems on this background natural that Article 86 TFEU establishes that the EPPO shall “*exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences.*” In light of the provisions of the EPPO proposal and the fact that national penal laws or national procedural laws are to be applied, it is natural that the CJEU does not have the authority and obligation to give (by a preliminary ruling) a binding interpretation of these provisions, which stay essentially national.

Further, Mr Bay Larsen gave a few examples of difficulties, which need further clarifications and analysis.

A first difficulty is related to the EU Charter for Fundamental Rights. In spite of the deliberate drafting choice made by the Commission, certainly trying to give flesh and blood to Article 86(2) of the TFEU, the EPPO remains a European Union body. This has consequences, even if Article 86(3) TFEU seems designed to give the EU legislator some leeway, including in setting up the regime for “judicial review of procedural measures taken by the EPPO in the performance of its functions.” One such important consequence is that the EU Charter for Fundamental Rights will be applicable to procedural measures such as carrying out an investigation for which the EPPO is responsible, even if this is principally carried out by national authorities acting in a national legal setting on the EPPO’s instruction. This may lead and sometimes oblige national courts to make preliminary references before the CJEU when the interpretation of the Charter raises doubts. In this respect the fairly recent *Åkerberg Fransson* case, Case C-617/10, should be born in mind, as it clarifies the field of application of the Charter and confirming its supremacy if applicable and in conflict with national law.

A second difficulty relates to the “non-attackable” character of EPPO decisions to investigate and to prosecute. Mr Bay Larsen, for analytic reasons, analysed this in reverse order and began with the latter decision – to prosecute or not – thus presuming that an investigation has been carried out. In the light of the Article 29 provision, a dismissal is explicitly exempted from judicial review when the EPPO decides to apply and agree to an out of Court settlement of the case, and this is accepted and leading to the dismissal of the case. Also, if the EPPO decides to prosecute, one may ask the question: Can this (intermediate) decision of a Union body be challenged directly before the Union Courts, in this case the General Court, by the suspected and now accused party, who certainly seems to be both individually and directly concerned? The answer to this question seems to be no. It is an intermediate decision which by definition entails automatic judicial review in the subsequent penal case before the national court (who, if need be, can make a preliminary reference to the CJEU). The decision thus by its very nature seems to be a “non attackable character”.

Furthermore, when the EPPO comes to the conclusion that the investigation carried out does not give the basis for a decision to prosecute, the situation is perhaps slightly more complex. The question is: Should there be a possibility of an administrative appeal of the EPPO’s decision and/or of judicial review of this decision? The Draft Regulation seems silent on this point and some will argue that this kind of negative decision is equally of a “non attackable character”. To this come the practical and principal difficulties to charge the General Court with the task of judicially controlling the insufficient character of the evidence leading to the EPPO’s dismissal of the case. In fact, if the General Court should examine the (insufficient) “evidence” in order to evaluate whether the EPPO has eventually/manifestly misapplied its powers in dismissing the case, it would amount to a substitute for the criminal procedure that the EPPO did not find a necessary legal basis to initiate.

If we reject this idea, and regard a “negative decision” as a decision which is in principle subject of judicial review at EU level (there will perhaps not even be any national court in play at this stage), it is not clear whether Article 86(3) gives a sufficient legal basis for secondary EU legislation to completely exclude “normal” judicial review at EU level as otherwise guaranteed by Article 263(1) second sentence TFEU, for parties having the necessary direct and individual interest according to paragraph 4 of that same article. Such “negative decisions” sometimes will be taken by the EPPO at a stage of the investigation when no national jurisdiction has been singled out and no national court is yet involved. The EPPO may already after examining written evidence available to it conclude that there is not a sufficient basis to continue and expand the investigation, and consequently to dismiss the case. At other times the decision of dismissal will be taken after a more complete investigation, which often will have involved national courts approving specific investigative measures like house searches, telephone bugging etc. according to the relevant national and EU rules. These remarks should just serve to remind what a complex situation we enter into when we move from the basic “Eurojust-scenario” of coordinating national criminal investigations and prosecutions and enter the “EPPO-scenario”, where an EU body will be conducting criminal investigations on behalf of the Union, even if the model for the latter is as modest as the current one suggested by the Commission.

Mr Bay Larsen then presented a few aspects of the investigative measures of the EPPO. Article 26(1) contains a non-exhaustive list in 21 points a) – u) - of investigative measures available to the EPPO and the relevant European Delegated Prosecutor(s). Member States will be under an obligation to make all of these investigative measures available. To the extent that further investigative measures are available to national investigators and prosecutors in a Member State, it seems that this Member State must equally allow the EPPO and European Delegated Prosecutors to use such additional measures under the same conditions, Article 26(2)(i)(f). Insofar as judicial control of the listed and unlisted investigative measures, Article 26(2), (4) and (5) makes a distinction. The measures listed in Article 26(1) points (a) – (j), must always be subjected to a (in principle prior) judicial control. These measures (like house searches, interception of telecommunications and use of under-cover agents) are generally measures which interfere seriously with the right to notably privacy, and the request for (prior) judicial authorization of such measures will already exist in most, if not all, Member States. For the investigative measures listed in Article 26(1), points (k) – (u), it depends on the content of the applicable national law, whether and to what extent judicial authorization is requested. If this is required by the national law of the Member State concerned, then it applies to the EPPO or those operating on request of the EPPO as well (Article 26(5)). Mr Larsen concluded that it does not seem shocking that national courts will be first in line also to scrutinize and eventually approve the various investigative measures applied on its territory if the prosecution in any case is going to take place before national courts, applying national penal law, following national criminal procedural rules and most often conducted by European Delegated Prosecutors, and that any coercive measure on the territory of a Member State will be implemented by the competent national authorities.

The EU Courts for their part generally lack competence to examine the compliance of EPPO acts with national law. This, to quite some extent, resembles the pattern of EU-/national cooperation/mutual (legal) assistance, when the national authorities offer legal and practical assistance to OLAF or other control-bodies of the Commission when they carry out inspections, seize documents, files etc. on the territory of a Member State. Moreover, it should be recalled, that the current EU judicial toolbox established by the TFEU (notably Article 258 (infringement), Article 263 (annulment), 267 (preliminary rulings) and Article 268 (damages)) does not contain an instrument suited for prior authorizations. It is on this background that one must see the proposed “legal fiction”, as some scholars have already characterized it, contained in Article 36(1), of the Draft regulation.

However, on questions of interpretation of the EPPO regulation or other elements of Secondary Union law, as well as Primary Union law, notably the Charter, national courts will have the possibility and sometimes the obligation to make a preliminary reference to the CJEU. This also implies that the CJEU in practice will have the power to rule on the compliance of national procedures and national laws with the obligations stemming from Union Law. Further, Article 36(1) constitutes an exception to the normal rules of EU law on judicial control of EU bodies. This may have consequences for the interpretation of the system set up, notably on the question of eventual compensation for moral and economic damages linked to investigation measures. On the one hand Article 36(1) seems to imply that national procedures for compensation for damages caused in investigations authorized by national courts should also be open to those who had been subjected to an EPPO investigation and have been kept in pre-trial custody during an investigation that did not lead to a verdict of guilty or perhaps even to prosecution. On the other hand it is far from clear that Article 36(1) has the power of pushing Article 268 TFEU aside in this respect. Art. 69(3)-(5) of the Draft Regulation further confirms the jurisdiction of the General Court in disputes concerning “non-contractual liability” – however, the precise extent of this competence is perhaps not fully clear. Finally, Article 47 of the Draft Regulation contains – by way of reference to Article 340 TFEU and to the general procedures in Article 268 TFEU – a special rule on “liability for unauthorized or incorrect processing of data”.

Mr Bay Larsen concluded that his remarks should not be perceived as an attempt to provide answers but rather a suggestion to elaborate upon the issues and elements highlighted in the process of legislation.

Ms Marianne Wade presented the main issues under the topic of democratic accountability. In general, Ms Wade highlighted that the principle of democratic accountability is embedded in the EPPO proposal in several places regarding the EPPO appointment and removal proceedings, the annual reporting to Council, Commission, European Parliament and National Parliaments and the legal accountability to MS courts and partly to the CJEU ensuring uniformity of interpretation. In addition, the EPPO’s activities will have to be in conformity with the Charter of Fundamental Rights of the EU as explicitly stated in Section 3 of the EPPO proposal. Also, the procedural rights will need to be further clarified in the proposal. She stressed that the EPPO is a supranational entity and there is a need to be innovative to ensure its accountability.

With a further focus on the democratic accountability, Ms Wade raised a question if the proposal is suitable to ensure for accountability in light of the concerns of EU tax payers. The decentralised structure is politically understandable and has many attractive features, but it creates problems in relation to accountability principles. Further, she raised the question whether the EPPO legal accountability to the national courts in respect of activities of the EPPO is sufficiently European in nature and whether it is suitable in providing democratically legitimate accountability. It was noted that the EPPO is a policy setting institution, as the Office will have to make certain decisions which falls under the policy making remit, eg. decisions in relation to ancillary competence, decisions on the relation with other EU organs, allocation of cases, adoption of internal rules. Also, the proposed regulation allows the EPPO to dismiss cases if they are regarded as minor and it also allows the EPPO to enter into transactions with suspects if the interest of justice is served by it. These are rather central policy decisions and such sensitive decisions certainly should be subject to scrutiny, such as democratic accountability. Therefore, in order to be democratically legitimate, these issues have to be determined more democratically. Also, the decentralised structure of the EPPO means that the EP and national parliaments should play a role. However, the danger is that national parliaments may be seen as concentrating on and representing only national interests, so an injection of a European element is vital. These are matters that are fundamentally important in securing the EPPO as a legitimate institution.

Furthermore, the EuroNeeds Study (conducted by Ms Wade in the Max Planck Institute) highlighted that prosecutors specialised in the PIF offences retain some scepticism towards the EPPO. Therefore, if those policy decisions which are to be made by the EPPO will not be subject to democratic accountability, the institution may be considered as not particularly legitimate by those prosecutors who are vital in the cooperation activities of the EPPO. The issue at stake is that no matter how independent the EPPO may be, it may be seen as a European institution which sets its own agenda.

Ms Wade also noted that there are various aspects of the proposal that requires more attention: ancillary powers, universal acceptance of evidence, decisions on jurisdiction. The idea of addressing suspect's rights by the proposal is very honourable and valid but the suitability of defining suspect's rights in the proposal - in the context of creation of prosecution body - is questionable.

Ms Wade in her conclusive remarks underlined that the proposed decentralised structure of the EPPO undoubtedly adds complexity and causes accountability problems. Some of the decisions to be made by the EPPO cannot be treated as technical implementation matters. They must be dealt in a democratically open, transparent and legitimate way. Therefore, the multi-level governance system in a criminal justice setting that is being created must be matched by suitable policy-setting and accountability structure, with the European nature of legal and democratic accountabilities in mind.

During the discussion, Mr. Vervaele raised a question on applicability of the principles of the Charter on Human Rights in the national courts, in view of Recitals 38 and 39 of the proposal. Mr Bay Larsen replied that it seems that the Recitals seem to go a bit further than Article 36. The issue would be fully clear if we created a European penal code, etc. but then we have to wait for another 20 years. He also noted that it seems impossible to eliminate the preliminary ruling system. Of course, maybe more than 90% cases, due to clarity, do not need to be referred for preliminary rulings, but there will be a percentage of cases which require clarifications by the CJEU.

3.3. Relationship with national authorities

Chair: *Mr Hans G. Nilsson, Head of Unit 2B – Fundamental Rights and Criminal Justice, General Secretariat, Council of the European Union*

Speakers:

Mr Frédéric Baab, Diplomatic Adviser to the Minister of Justice, France

Mr Jorge Espina, Deputy Prosecutor, International Cooperation Unit, Office of the General Prosecutor, Spain

Mr Eugenio Selvaggi, Deputy, Prosecutor General, Supreme Court of Cassation, Italy

Mr Hans G. Nilsson briefly mentioned two aspects of importance in the discussion on the relationship between the EPPO and national authorities, namely that the relationship will highly depend on the type of structure of the EPPO and the form of decision-making procedures.

Mr Frédéric Baab explained that there is an informal group of 13 -14 Member States which have a different view on the future structure of the EPPO than the one proposed by the European Commission. Their idea is that Prosecution Office created from Eurojust shall have a collegial structure. In that college there shall be one member from each Member State which is participating in the EPPO. Mr Baab emphasized that the investigations have to be conducted by/with national authorities. National authorities should be the leading players in investigations and the only ones which have powers to execute investigation measures, but under the supranational body in the form of the EPPO College. For example, when several MS are concerned, there will have to be investigations in all MS concerned, but with coordination at a European level. Competent national delegated prosecutors shall lead the investigation, but they should act under the EPPO authority. If this would not be the case, there would not be any EPPO. Mr Baab noted that the informal group is of the opinion that this authority should be exercised by national members and this should be done in the framework of Chambers consisting of concerned national members. Once the investigation has been executed, the coordinating prosecutor will have to make a report to the Chamber and to the EPPO. Hence, the national member will be much more involved in the process, although the decision to prosecute is to be made by the College.

Mr Jorge Espina briefly outlined the main elements of the proposed integrated and decentralised EPPO model and highlighted the negative and positive side of the EPPO “double-hat” system. In general, negative aspects for national prosecutors are double workload, possible overlap of national and European functions, and double loyalty. On the other hand, positive aspects can be seen in the internal coherence and the growing trust for decisions from foreign institutions. The “double-hat” prosecutor will play a crucial operational role, as this prosecutor will seek and receive information, will have access to relevant data and registers, initiate and have a leading role in investigations and liaise with national authorities, propose indictment and consult on the choice of forum. Also, as provided by Article 70(3), “double-hat” prosecutors will have a possibility to appear before national Parliaments. Besides, subject to Article 17, these prosecutors will be responsible for facilitating urgent measures and referrals as well as cases of ancillary competence. Therefore, even though such a structure is peculiar and difficult, it is necessary for procedural, economic and political reasons.

Mr Espina also talked about the main aspects of the hierarchical relationship. In general, Article 11 of the proposal provides for the applicability of the principles of impartiality and proportionality to the delegated prosecutors. However, the prosecutors will not be completely independent as they will be subject to the national hierarchy and will act on behalf of MS. In fact, difficulty arises from the two chains of command as provided by Article 6(5) and (6). Even though, according to the provisions, delegated prosecutors will be subject to exclusive and priority authority of the EPPO and independent from the national Prosecutor General, it might be difficult to implement this principle in practice if they are embedded in the national system. Besides, all judicial control will be based on national courts.

Mr Espina summarised that certain possible mechanisms may solve identified problems and serve to ensure better protection of the independence of the EPPO. Such mechanisms include dismissal and appointment procedures, but may also be improved by setting up a Consultative Forum as a way of building mutual trust between the EPPO and national Prosecution Services, with Eurojust as the host. A Consultative Forum may have the following functions: to discuss practical issues, to plan and foresee needs, to prevent frictions, and to support Delegate prosecutors.

Mr Eugenio Selvaggi generally expressed support to the proposal. The EU budget is an important value for the whole Union. Therefore, it is logical and consequent that the defense of the budget, i.e. prosecution of offences against the financial interests of the EU, shall primarily fall within the competence of a European body. The protection of the financial interests of the EU is currently not effective, mainly because of the differences in legal systems of MS. It is clear that the establishment of the EPPO should be looked at as a step ahead in the construction of a future Europe. The Lisbon Treaty designs a pattern where the community system and national systems operate in parallel. However, the EU is not a Federal State, and the US example – where you have 51 legal systems, i.e. the federal ones and the 50 states’ systems – would not work for our purposes. Yet, the example of combination of different legal systems operating simultaneously might help.

Regarding the consequences of the establishment of EPPO on national prosecution offices, the EPPO will have a strong impact on structures and the functioning of national prosecution services, including the need for reform of statutory or even constitutional laws. Mr Selvaggi referred to the Italian situation and noted that such a novelty would impose major changes in the Italian legal system, where, in principle, the prosecuting officials and their chiefs are independent and not hierarchically organized, and where a centralized Prosecution office is not provided for by the law.

Further, Mr Selvaggi commented on the provisions contained in Article 27(4) of the proposed Regulation, which provides for the choice of the relevant jurisdiction of trial by the EPPO. He referred to the decision of the European Court of Human Rights in the case *Camilleri v. Malta* [22 January 2013], in which the applicant claimed that the Maltese system – which is almost similar to the British system – according to which a non-judicial authority, be it police or public prosecutor, has a discretion to choose the court for the accused to be brought to trial, was to be considered against Articles 7 and 6 of the Convention, as it did not make clear which penalties will be imposed for the offence committed and which are the consequences that a given action may entail. The Court in Strasbourg stated that the Maltese law results in a violation of Article 7 because the application of the relevant law would depend solely on the prosecutor’s discretion to determine the trial court. With reference to Article 27 of the EPPO proposal, the question of penalties also arises, taking into account that the present PIF initiative does not foresee uniformity of penalties. The same problem also arises when you have more than one jurisdiction which might be competent in respect of the case. It is well true that Article 27 provides for general criteria, which is listed in para.4 which refers both to the choice of the jurisdiction and to the determination of the competent court at a national level (the Italian text is not that clear). However, it appears that Article 27(4) requires further elaboration, as it is not clear whether the list of criteria indicates also the order of priority. The expression “shall choose” might induce to conclude that there is some discretion on choosing, i.e. will the EPPO decide also taking into account penalties provided for at a national level? Would he take into account a statute of limitation established by national jurisdictions? Would he take into account whether the case will be tried by a jury, rather than by professional judges?

Mr Selvaggi also raised a question on whether it would be more appropriate to leave the determination of the national court to the domestic legislation. He opined that listing more precise criteria for the choice of the proper jurisdiction would be a positive improvement, including possible solutions in case of conflicts among courts, thus involving the interested parties in the questions of control of legality. Mr Selvaggi summarized that the EPPO will lead to reform of national legal systems and MS should be ready to give up some of its sovereignty. He also made reference to the structure of a College and underlined that not only the structure is being dealt with but also the fundamental rights. If there is a structure of a College then there is less Europe and *vice versa*.

Mr Baab replicated that if all the powers are transferred to the European level, then there will be less Europe. The EPPO system should be deeply rooted in the national systems of MS because otherwise it will not function. Hence, the EPPO cannot have all powers as this would be a violation of MS sovereignty.

4. SESSION III: PROCEDURAL REGIME OF THE EPPO

4.1. EPPO Rules of Procedure

Chair: *Ms Katalin Ligeti, Professor of European and International Criminal Law, University of Luxembourg*

Speakers:

Mr Stefan de Moor, Judge, Court of Appeal, Antwerp, Belgium

Mr Gert Vermeulen, Professor of Criminal Law, Ghent University

Mr Holger Matt, Chair of the European Criminal Bar Association, Frankfurt

Mr Peter Hustinx, European Data Protection Supervisor

Ms Katalin Ligeti outlined the main aspects of the procedural regime proposed by the Commission. She emphasized that the EPPO proposal refers to both European and national systems, and the whole proposal is largely devoted to the pre-trial phase. She noted that the so-called central decisions of the EPPO, on opening of investigations, initiating prosecution and choosing between jurisdictions, will be governed by the European rules. These provisions confer binding powers on the EPPO to open an investigation, to initiate a prosecution and to choose the forum for the trial, and this is the major difference in comparison with Eurojust. Furthermore, the proposal lists the investigative measures that must be available to the EPPO and its delegates, and provides the threshold for the application of these investigative measures. Hence, the proposal details which investigative measures require judicial authorisation. However, the details of the investigative measures are subject to applicable national law. Furthermore, the list of powers contained in the proposal is not exhaustive. The EPPO and its delegates may resort to investigative measures which are not enlisted in the regulation and which are available in the Member State where the investigation is to be conducted.

In relation to applicable law, Article 11 of the EPPO proposal provides that “the applicable national law shall be the law of the Member State where the investigation or prosecution is conducted“. This precludes the definition of applicable law in cross-border cases. If Article 18 (operation of delegates) and Article 25 (European territoriality) are read in conjunction with Article 11 (on applicable law) one may get an impression that in respect to the investigation, the delegate prosecutor can act only on his national territory and apply national law only. However, one may read Article 18 so, that the prosecutor can act by himself, but then the question regarding applicable law arises.

Ms Ligeti then highlighted certain aspects regarding admissibility of evidence. As provided by Article 30(1), the evidence should be collected and presented by the EPPO and should be admissible in the territory of the EU.

Finally, the proposal also contains a chapter on procedural rights which foresees that the procedural safeguards should be implemented in the national legislation. However, the proposal does not provide any definition of suspect or accused and the reference to safeguards in Article 32 is needed.

After the general introduction of the EPPO framework, Ms Ligeti noted some of the consequences of the proposal. The European Commission refrained from providing common procedural rules and mainly refers to national rules. This has several consequences. First, the EPPO will not have uniform power and this might result in fragmentation in the Area of Freedom, Security and Justice. According to a comparative analysis on the investigative measures proposed, most of those measures (often intrusive) do not exist in all Member States, and they will therefore have to be implemented by them. This may to a certain extent result in an approximation of investigation powers in Member States but it will not achieve uniform investigative powers for the delegates.

Secondly, Ms Ligeti expressed her doubts on whether this EPPO will actually have European powers and quoted Article 86(3) TFEU which requires that the regulation shall “*determine the general rules applicable to the European Public Prosecutor's Office*”. She opined that the proposal is based on the technique of drafting framework decisions. The list of investigative measures resembles the framework decision on EAW and other framework decisions within the mutual recognition area. Ms Ligeti questioned the legal basis and the European character of the listed investigative powers.

Thirdly, it is doubtful whether the proposed procedural framework properly follow the constitutional objectives of the Treaty, mainly to establish the area of AFSJ as proclaimed by Article 3 of the Treaty, to endeavour at high level of security foreseen by Article 67 of the Treaty and to ensure protection of the Union’s financial interests as required by Article 325 of the Treaty. Also, Articles 4 and 67 of the Treaty requires respect for national diversity. Hence, the proposal has to be assessed against these objectives entrenched by the Treaty, and the proposal - which refers vastly to the national law - may not follow the objectives of the Treaty.

Fourthly, the proposed mutual recognition of evidence, collected according to different procedural laws, cause substantial problems both for a judge at a trial court and to the defendant.

Finally, the questions whether the proposed mixed system of European and national procedural rules is a solution to existing problems and whether it is a workable model remain. Ms Ligeti concluded that the proposal does not manage to find a balance within the procedural framework.

Ms Ligeti also highlighted that the concept of judicial review under Article 36 is an innovative concept, which brings the inherent contradiction that on one hand the EPPO should be considered as a European body and on the other hand should be considered a national body for the purpose of judicial review. Also, the exclusion of preliminary rulings and judicial review on the choice of forum are problematic issues. Ms Ligeti also noted that the concept of transactions in the proposal needs to be further elaborated and clarified.

Mr Stefan de Moor in his presentation focused on the investigation and prosecution in the field of corruption within the EU institutions. Firstly, he highlighted the present situation in the area concerned. OLAF uses reporting combined with “whistle blower” protection. When investigating, OLAF has a direct access to the EU databases and has direct reporting power to national judicial authorities. However, this does not function well due to verification need before opening the case and because of the “private” element in the investigative data. Also, other institutions than the Commission sometimes dispute OLAF’s competence in non-PIF matters, or invoke immunities in relation to administrative investigations. Further, prosecution services sometimes refuse to accept jurisdiction of cases. In general, the global strategy in place is lacking efficiency because national judicial authorities want to limit the scope of the investigations, since it is necessary to plan investigations and prosecutions over several jurisdictions, since Eurojust lacks the power to impose solutions and since the use MLA mechanisms often are too slow. OLAF can play a facilitating role and has a natural vocation to do so. However this is sometimes refused both by the judiciary and the institutions. JIT’s could be an alternative to MLA, but they are difficult to set up. In a rare case of corruption in which a JIT had been set up, one MS opposed OLAF participation in the JIT. Finally, national prosecution services sometimes refuse to accept jurisdiction and OLAF has no powers to impose it.

Mr de Moor further discussed particular aspects of the EPPO proposal relating to the investigation and prosecution powers. Subject to Article 15, the proposal foresees a reporting obligation from the institutions to the EPPO. It is not clear whether the current reporting scheme for EU officials will subsist after the establishment of the EPPO. The EPPO will in practice need to request the lifting of immunities and inviolabilities before accessing and securing information. If OLAF loses its internal powers in this field, and without compensatory measures, this will diminish the existing means in the fight against corruption.

As always, when introducing new organisations, the challenge is to avoid additional bureaucratic burdens, particularly in sharing information. There is nothing mentioned with regard to EU databases in Article 20. With regard to the collection of information, Eurojust and Europol are mentioned. However, with regard to corruption, neither of them dispose of specific powers in this field. The duty to provide information and assistance provided by Article 25(2) is not a strong instrument. Article 24 lays down the provisions on access to the CMS and gives the impression of a nationalist reflex: it is logical that European Delegated Prosecutors (EDP) only have access to the index and the temporary work files of the cases to which they are assigned. They could then, when the index demonstrates a link, ask for access to any other TWF's.

Mr de Moor then highlighted certain aspects of legal compatibility in the investigation phase. It is uncertain who can initiate the investigation. If the delegated prosecutor can only do it on behalf of the EPPO, what is then the meaning of the obligation to inform the EPPO "immediately" provided by Article 16 para.2?

Secondly, according to Article 10(2) the delegated prosecutors should be appointed as prosecutors under national law. The question is whether prosecutors will have the power to investigate all criminal offences provided by the Directive in all existing national systems. In systems which have the "traditional" investigating judge, prosecutors cannot ask for pre-trial detention, house searches or telephone interceptions for "their" investigations. They will have to refer the whole investigation to a judge and the judge cannot take instructions by the EPPO as foreseen by Article 18. However, this is different for MLA or EAW. In the latter cases, investigation judges execute "foreign" orders, provided that they are issued by competent authorities and that they satisfy the double criminality condition.

Further on, can the EPPO conduct the investigation him/her self, if he's not a prosecutor under national law? Can he bring the case to the competent national court himself without being appointed as prosecutor under national law?

Article 26 provides for investigation measures, which do not always comply with the legal regime of the MS. As an example: under point (e) there seems to be a restriction on the telecommunications to and from the suspected persons. For an example, Belgian law allows interception of telephones of persons, presumed to be in regular communication with the suspect. It is difficult to imagine a more restricted regime being applicable for PIF offences than for other offences.

Mr de Moor also raised a question on the regime under which investigation measures are to be executed. Article 26(2) indicates that they are subject to the conditions provided for by the Regulation and national law (supposedly of the MS where the measure are to be carried out) but how to combine European and national law? Does Article 26(3) imply that the EPPO should give reasons for carrying out a house search and explain why less intrusive measures do not suffice to achieve the objective? In Belgium this would imply that the measures are subject of another (stricter) regime than in other cases. Finally, wouldn't it be simpler to foresee that the EPPO can exercise the powers (and investigation measures) conferred to national prosecution services?

Mr de Moor also noted a few aspects with regard to jurisdiction. First, the PIF convention, its Protocol, as well as the EU convention on corruption, provide for the obligation of MS to take jurisdiction over their own nationals. Besides, the Protocol provides for the obligation for the MS who have the seat of the institution employing an EU official (suspected of corruption affecting the EU financial interests), to take jurisdiction over him. Regarding fraud, a similar obligation for the MS as regards their nationals is foreseen in the PIF convention. The criteria laid down in Article 27(4) include none of these points of attachment. Nationality and seat of the institution are easy to determine, which is not always the case for the place where the offence is committed, or where the accused has his habitual residence, or where most of the evidence is located.

Finally, Mr de Moor highlighted certain issues regarding referral of dismissed cases and admissibility of evidence. “Referral” of criminal “cases” to authorities other than judicial by a prosecution service, on its own initiative, seems to be rather unusual. Article 28(3) does not include any criteria or grounds for such referral. It is not clear what is understood by “referring a case”. Does it mean that the complete temporary work file is transmitted? OLAF as well as “judicial authorities” are mentioned in the provision, which however does not clarify what their role is in a possible recovery. Wouldn’t it be sufficient to mention that the EPPO informs the national administrative authority or institution concerned of the dismissal, leaving it up to the latter to request access to the case file for the needs of administrative or disciplinary proceedings?

With regard to admissibility of evidence, is it feasible that for other offences, prosecuted by the EPPO, including those based on the ancillary competence of the EPPO, the national rules on collection or presentation of evidence will not apply? Will this resist the test of the Constitutional courts? What if the Regulations would foresee that national rules on collection or presentation of evidence do apply?

Mr Gert Vermeulen in his introductory remarks underlined that the admissibility of evidence in the context of MLA system is a very important issue. MLA, international cooperation in criminal matters based on principles of mutual recognition does not produce evidence which is *per se* admissible. If the evidence is not gathered by judicial authorities, it would probably not be eligible.

In an explanatory memorandum from 2003 the European Commission stated that its goal was to introduce rules that would lead to admissibility of evidence. With the goal to discover the pre-conditions of general admissibility of evidence, the Commission issued a Green Paper in 2009 on gathering evidence and on admissibility of evidence as well as conducted a study on a cross-border collection of evidence. In general, there are so many differences on gathering evidence that it is likely that those differences and problems will remain with regard to the EPPO. It is likely that there will be incompatibility in most areas of collecting and admitting evidence from different MS, as the evidence may for example not exist or not be admissible before court in certain MS. In order to achieve admissibility of evidence, specific applicable guarantees would probably need to be identified, or good common minimum standards which can be adhered to by all MS established. Also, the ECHR jurisprudence should be considered, such cases as *Klaas v. Germany* or *Kostovski v. The Netherlands*.

The EPPO proposal makes quite clear that when the EPPO gives orders, send out MLA requests or participate in JITs, the EPPO should be considered as a national authority. Therefore, it seems that the difference between the functioning of the EPPO and the functioning of the judicial national authorities is greatly diminished or non-existent. So if we collect evidence from everywhere, using unknown measures, judges would have great problems to admit the evidence. If the provisions laid down in the EPPO proposal are fine for us, then we should apply the same principles in general and introduce the same provisions in respect of Article 82 TFEU. Mr Vermeulen underlined that Article 47 of the Charter referred to in Article 30 of the EPPO proposal applies to the trial stage of proceedings, while Article 30 is concerned with pre-trial investigations. In his conclusive remarks, Mr Vermeulen emphasised that the European Commission had failed to properly address the issue of admissibility of evidence in the EPPO proposal, as it also did in the EIO initiative.

Mr Holger Matt underlined the importance of defence rights in the light of the principles of proportionality, accountability and independence. He further expressed appreciation to the European Commission for the consultations with the practitioners on the aspects of procedural safeguards. Mr Matt referred to main aspects that have been touched upon in the ECBA statement issued in February 2013, such as the rule of complementarity, rule of proportionality, equality of arms, and democratic accountability. Many of the aspects have been taken into account in the EPPO proposal. However, the need to avoid forum shopping has not been addressed by the EPPO proposal. On the contrary, the proposal seems to promote forum shopping for the EPPO.

Mr Matt highlighted that a compensation mechanism after that an investigation or prosecution has been carried out is missing. Compensation should in relevant cases be granted in respect of the EPPO proceedings or in relation to the number of days of deprivation of freedom.

The rights foreseen in Articles 33-35 are embedded in the ECHR. Therefore, reference to national law does not help, because the national law does not provide for these protection rights: European rules to protect the said rights are necessary. Further, the EPPO proceedings should be proceedings with mandatory defence proceedings. Only qualified lawyers should be appointed for defence proceedings. As regards legal aid scheme, it should be based on an EU order and not on MS.

Mr Matt finally also stressed that the rule on transaction in Article 29 does not contain a form of bargaining on innocence and guilt.

Mr Peter Hustinx in his presentation highlighted the main aspects of processing of personal data as foreseen by the Articles 37 and 38 of the EPPO proposal. On one hand, personal data could be administrative data (staff, prosecutors, visitors, etc.) but it also includes all operational data (about suspects, accused, witness, investigation measures). In general, EDPS is of the opinion that the proposal recognises data protection principles. In the coming months the EDPS opinion on the EPPO proposal will be issued. Further, Mr Hustinx noted that the EPPO must comply with EU and national applicable laws and the rules of data protection when collecting evidence. The EPPO has a responsibility to comply with the Regulation 45/2001 as it is laid down in the proposal. He thereby also emphasised that national law is not fully harmonised within the scope of Data Protection Directive 95/46.

An additional complication is the current legal system of the EU, as it is not as comprehensive as it should be because of the current revision of the framework. Last year the European Commission proposed a directive and a regulation on data protection in order to replace the current texts. Discussions on the proposed texts are ongoing in the Council and European Parliament. Therefore, the situation is currently even more complex. Also, if the proposal was adopted in the framework of enhanced cooperation, the diversity of applicable relevant law will be even more diverse taking into account the data originating from non participating MS. Mr Hustinx in his conclusive remarks noted that the role of the EDPS as regards the EPPO is of a consultative nature.

5. SESSION II: MATERIAL SCOPE OF THE EPPO

5.1. EPPO Competence

Chair: *Mr Lothar Kuhl, Head of Unit D.1 – Policy Development, OLAF*

Speakers:

Mr Joachim Eckert, Presiding Judge, District Court, Munich, Germany

Mr John Vervaele, Professor of Economic and European Criminal Law, University of Utrecht

Mr Gintaras Švedas, Professor of Criminal Law, Vilnius University

Mr Lothar Kuhl outlined the main issues falling under the material scope of the EPPO. The exclusive competence of the EPPO under Articles 11-13 was underlined. He underlined two issues at stake: criminal offences affecting the financial interests of the Union under Article 12 (enshrined in PIF Directive) and ancillary offences which are inextricably linked to offences affecting the financial interests of the Union.

The PIF Directive, referred to in Article 12, is currently negotiated and the General Approach has been reached in June in the Council under the Irish Presidency. There have been difficulties on defining the scope of financial interests, in particular regarding the question of VAT which the Council excerpted from the scope of the Directive. However, with reference to the current CJEU jurisprudence, it is undisputable that the VAT is included in the scope of the financial interests of the Union. It is also worth noting that the proposal underlines that the EPPO has competence in respect of PIF offences, as provided by the PIF directive as implemented by national law. The directive sets certain goals for approximation of laws, but will not be applicable directly before the courts in MS. Also, the way it is implemented in MS may vary. Therefore, the specific material scope of the EPPO is rather linked to the chosen MS.

A second important issue is that of "inextricably linked offences", which are committed in a sense which abuse financial interests of the EU and need to be included in the ancillary competence of the EPPO. The EPPO will be competent for such offences if they have an element of preponderance. Referring to Recital 22, the element of preponderance needs to be assessed by specific circumstances of the individual offence as well as on the basis of the damages at stake, specific interests of victims and applicable penalties. It should also be stressed that different offences may be committed by one single conduct. Examples of such cases are applications for EU subsidy using forged documents, unauthorised sharing of privileged information for a candidate in a tender procedure, violation of professional secrecy provisions or smuggling of a container full of cigarettes containing prohibited commodities which do not fall under customs. Before taking action, the EPPO should assess whether there is a preponderant EPPO element after consulting MS national authorities. Furthermore, Article 13(2) foresees dispute settlement mechanisms in case of disagreement between the EPPO and national authorities.

Mr Joachim Eckert emphasised the risk of loosing EU money due to such factors as mismanagement, corruption and other criminal actions in his presentation on prosecuting offences affecting the EU's financial interests. He further underlined that both active and passive corruption of national and Community officials in all Member States must be criminalised. Examples of offences affecting the EU's financial interests include customs fraud, abuse of subsidies and tax-fraud. These crimes are often difficult to fight, in particular since tax fraud is usually committed in the frame of tax-carousels, and crimes with subsidies touch on aspects of migration and refugees. Also, a great number of crimes affecting financial EU interests are related to subsidies for waste or agriculture, renewable energy companies and smuggling of cigarettes. Carbon credit fraud is another variation on VAT carousel fraud, which has also been observed in other markets. It is therefore important to include VAT crimes in the future PIF Directive. In his concluding remarks, Mr Eckert stressed that there is a need for a strong EPPO, with direct competence and hierarchical structure in relation to national prosecution offices and other related EU bodies.

Mr John Vervaele, in his presentation on possibilities of prosecuting other serious crimes, underlined that it is difficult to define those "other crimes" if it is not clear what the PIF crime is. The offences under discussion are at EU level only, as developed by the CJEU, and therefore the concept at national law have to be derived from an autonomous European notion. The legal principles *nulla crimen sine lege*, *lex certa* and *lex previa* have to apply to the EPPO. He further noted three types of crime falling under the EPPO competence, i.e. PIF crimes as understood in Article 86 TFEU, ancillary crimes and other serious crimes under Article 86(4) TFEU. Mr Vervaele suggested that offences falling under the EPPO competence must be clearly defined, and distinguished three legislative techniques for this. The first and preferred technique is to provide a list of offences falling under the competence of the EPPO. Secondly, harmonisation of offences that should be inserted in the national penal codes could be foreseen. A third option would be a classic harmonisation of national laws, which gives a lot of leeway and discretion.

Mr Vervaele also drew attention to the Recitals 21 – 25 of the EPPO proposal, in which a link between substantive criminal law and classic jurisdiction is foreseen. For example, Recital 25 provides for a competence “as broadly as possible” for the EPPO, even beyond the territory of MS, which in some way disagrees with the provisions on jurisdiction of the EPPO laid down in the proposal. Reference was also made to Articles 2, 4, 12 and 13 of the EPPO proposal. Mr Vervaele then made a few comments on the draft PIF Directive. Firstly, the directive is not harmonising the penalties as was foreseen by the initial proposal and the consequence is the fragmentation of penalties on PIF crimes in the MS. The present text of the draft PIF directive does not include crimes such as fraud in public procurement or tenders, abuse of trust or abuse of funds, or crimes related to VAT. Therefore, these crimes will not fall under the EPPO competence. Hence, the directive in its current shape would not solve the problems, as it is missing the main criminal activities.

Mr Gintaras Švedas provided a comparative analysis of the provisions of the draft PIF Directive and the EPPO proposal from the perspective of the Lithuanian legal system. In general, there is a possibility that the Regulation provisions on jurisdiction will conflict with the requirement in the PIF Directive on MS to assert jurisdiction over the offences. It seems difficult to implement the provisions on sanctions on fraud in national law. The question arises whether the EPPO will prosecute legal entities, complicity in offence or uncompleted offences. The subordination of national powers to supranational powers is not acceptable. Further, the EPPO proposal also determines coercive measures. Lithuanian laws contain some of them, but only with reference to serious crimes. The degree of seriousness and severity of the crimes have to be taken into account in this context.

Another problematic issue concerns admissibility of evidence. Investigations of multiple offences which are partly falling under national and partly under EPPO competence will require two different, parallel processes. How should such situations be dealt with? In principle, sentencing rules under national systems might need to be revised. With respect to other serious crimes, a simple solution should be chosen based on the competence of the EPPO.

6. CLOSING REMARKS

Ms Lotte Knudsen, Director JUST.B, Criminal Justice, DG Justice, European Commission, argued that the chosen decentralised EPPO structure with a double hat system is the best model for reasons of efficiency and independence in prosecuting PIF crimes. She noted that some Member States raise certain issues and questions on the chosen structure, but the project is on the table for discussions and for finding ways forward.

Mr Darius Žilyš, Director of International Law Department at the Lithuanian Ministry of Justice, concluded that the discussions show a great interest in the proposal, but that there is a lot of work ahead, to develop ideas and to clarify new questions raised. The Presidency considers the EPPO question as a priority. The comments by academics and practitioners merit attention. In order to achieve the required unanimity on the proposal, the negotiations on this very important issue should be conducted comprehensively, and sufficient time should be devoted to deliberate upon all aspects of the proposal, including at experts' level. The EPPO should be operable in the vast majority of Member States or at least as many as possible. He concluded that the discussions showed that the proposal is very interesting but there is a lot of work ahead with a lot of ideas and new questions.