The Establishment of the European Public Prosecutor’s Office after the Lisbon Treaty

Presentation
at The Jean Monnet Centre of Excellence for EU Studies
Keio University

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Overview of this Research

• Research Question:
  Which organization would undertake the creation of the European Public Prosecutor’s Office (EPPO)?
  Europol, OLAF, Eurojust or another new organization?

• Purpose of the Research and the Presentation:
  1) To give an overview of the future EPPO
  2) To understand the process of harmonization of European Criminal law

Methodology: Comparative law, EU Institutional Law
Pre-Lisbon System: Maastricht Treaty 1993

The way in which the cooperation in JHA is constructed in the Treaty of Maastricht

European Union

- EU Treaty
  Art. 100c: creation of powers in visa policy area

- Common Foreign and Security Policy

- Title VI of the EU Treaty: Directives regarding cooperation in justice and home affairs

Only a small number of powers created in the first pillar

All of the most important powers transferred into the intergovernmental „third pillar“

Picture 1
Post Lisbon Treaty

Pre-Lisbon Pillar Structure

Post-Lisbon Structure

The Lisbon Treaty

Picture 2
Article 86 of the Treaty of Functioning of European Union (TFEU)

- (1) the Council [...] may establish a European Public Prosecutor's Office (EPPO) from Eurojust.

Establishment of a EPPO from Eurojust by a Council Regulation

- (2) EPPO is responsible for investigating, prosecuting, and bringing to judgment, where appropriate in liaison with Europol

2. **Purpose**: to combat crimes affecting the financial interests of the EU
Agenda

1. **Introduction:** Preceding Studies/Methodology
2. **The EPPO Project**
   2.1 **Current Major Prosecution Systems in Europe**
   2.2 **The EPPO Project and the Lisbon Treaty**
   2.3 **Which organization will take over the EPPO?**
3. **Recent Movement:**
   Block Opt-Out of the U.K., Ireland and Denmark
4. **Summary and Conclusion**
1. Introduction

Preceding Studies on ECL

Europe

- European Criminal law and Comparative Criminal Law
  Prof. Andre Klip (The Netherlands), Prof. Daniel Flore (France), Prof. Paul De Hert (Belgium), Prof. Kai Ambos (Germany) etc.

- European Public Prosecutor’s Office Project
  Prof. Katalin Ligei (Luxembourg), Martijn Zwiers (The Netherlands), Eurojust etc.

Japan

Prof. Y Suemichi (Nanzan University) etc.
2. The European Public Prosecutor’s Office (EPPO) Project
2.1 Current Major Prosecution Systems in Europe with Complexity and Diverse Nature

Fundamental Difference:

*Adversarial System vs. Inquisitorial System*

1. Common Law
2. Civil Law 1
   - French Law
3.1 Civil Law 2
   - German Law
3.2 Civil Law 3
   - German Law: Italian Law
4. East European Law
   - Outside of this research scope
2.1.1 Common Law Prosecution System
(England and Wales, and Ireland)

Adversarial System

Horizontal System

• 1) Position of Prosecution:
A relatively lenient hierarchical system with a semi-independent position
(monitored by the Attorney General bound by Parliament and Cabinet)

• 2) Wide Range of Prosecution’s Discretion:
Almost no Discretion in a pre-trial stage: Police can decide to prosecute or
not based on sufficient evidence

• 3) Balance of Power between the Police and the Public Prosecutor
Police have a strong and independent power to investigate and to charge a
suspect except certain crimes in an investigative and a pre-trial stage

Exception: More complex crimes such as organized crimes particularly in
relation to drug trafficking and money laundering
2.1.2 Civil law 1: French Legal System (France, Spain, Belgium, the Netherlands etc)

Centralized Structure

Inquisitorial Systems:

1) Position of Prosecution:
A strong and centralized executive power
Prosecution services under the Minister of Justice

2) Prosecution’s Discretion:
High Discretion under strict ministerial control in accordance with ‘the Principle of Opportunity’

3) Balance of Power between the Police and the Public Prosecutor
Prosecution service controls the police in an investigative stage

Main actors in a pre-trial stage in the French law system: Investigating judge (Juge d’instruction, procureur), and police
In practice, only 10% for which Juge d’instruction’s leadership is necessary such as complex and serious cases after the prosecutors or victims (partie civil)
2.1.3.1 Civil law 2 German Law System  
(Germany, Hungary, Austria etc)  
Centralized and Vertical Structure  

- 1) Position of Prosecution:  
Federal and State officer Under the Ministry of Justice  

- 2) Prosecution’s Discretion:  
Narrower discretion under stricter Ministrial control in line with the Mandatory prosecution ‘Principle of Legality’ if there is sufficient evidence except under certain circumstances  

- 3) Balance of Power between the Police and the Public Prosecutor  
Prosecutors control the whole pre-trial stage  

The police can investigate under the legal control of prosecutors  
In practice, the police completely investigates the great majority of cases on their own initiatives
2.1.3.2 Civil law 2 Bis: German Law-
Italian Legal System

More loyal to be the Legality Principle

• 1) Position of Prosecution:
  Full independence of executive and legislative powers (Principle of Legality)

• 2) Prosecutor’s Discretion:
  Very Narrow Discretion: A Strict Mandatory Prosecution (Principle of Legality)
  Judge’s Permission is necessary to dismiss all cases (Article 112 of Italian Constitution)

• 3) Balance of power between the Police and the Public Prosecutor
  Merely public prosecutors can initiate the investigation and proceed in pre-trial and trial stage
  Police may investigate under the Ministry of Internal Affairs
### Summary: Diverse Prosecution Systems in Europe

<table>
<thead>
<tr>
<th></th>
<th>Common Law</th>
<th>French Law</th>
<th>German Law</th>
<th>Italian Law</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1) Position of Prosecution:</strong></td>
<td><strong>Semi-independence</strong> monitored by democratic power</td>
<td>Under the centralized executive system under the Ministry of Justice</td>
<td>Full independence from executive power</td>
<td></td>
</tr>
<tr>
<td><strong>2) Prosecution’s Discretion:</strong></td>
<td><strong>Wide</strong> under the principles of opportunity</td>
<td><strong>Narrow</strong> under the principles of legality</td>
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<tr>
<td><strong>3) Balance of Power between the Police and the Public Prosecutor</strong></td>
<td>In a Pre-trial Stage, <strong>Police have a strong and independent power</strong></td>
<td>An investigative stage: Prosecutors control the police In a Pre-trial Stage,. <em>Juge d’instruction, procureur, and police</em></td>
<td>The police can investigate under the legal control of prosecutors</td>
<td>In a pre-trial and a trial stage, merely public prosecutors can initiate the investigation and proceed</td>
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Toward the Establishment of the EPPO

• → The EPPO needs to unify and arrange among these different systems

• → Analysis of existing EU criminal and judicial cooperation organizations such as OLAF, Europol and Eurojust, is the KEY for the purpose of a future Criminal Justice Integration mechanism in Europe
2.2
Is the idea of the EPPO a new concept?

This is not a new concept but rather has long been considered since the 1997 *Corpus Juris*
2.2 The EPPO Project

Blue Colour: *Aquis Communautaire* in relation to crimes affecting Financial Interests of the EU

<table>
<thead>
<tr>
<th>Chronology</th>
<th>Description</th>
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<tbody>
<tr>
<td>1993</td>
<td>Maatricht Treaty - Article 3K (2) (c)</td>
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<tr>
<td>1995</td>
<td>Convention on protecting the EC’s Financial Interests (PFI)</td>
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<td>1996, 1997</td>
<td>PFI Convention Protocol I and II</td>
</tr>
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<td>1997-2000</td>
<td>Corpus Juris</td>
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<tr>
<td>2001</td>
<td>Commission Green Paper</td>
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<td>2003</td>
<td>Green Paper Follow- Up Report</td>
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<tr>
<td>2007</td>
<td>Lisbon Treaty - Article 86 of the TFEU</td>
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<td>2009</td>
<td>Stockholm Programme</td>
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</tbody>
</table>
The assumed roles and scopes of the EPPO

Ratione Materiae Competence (Subject-Matter Jurisdiction) - PFI Convention and its Protocol I and II

1) Fraud 2) Corruption 3) Money Laundering - highly possible

• Market rigging, conspiracy
• Article 84 (4) of TFEU: Future crimes such as human trafficking and cybercrimes

Ratione Loci Competence (Territorial Jurisdiction) – Green Paper

Article 26 (2) of Corpus Juris

1) Territorial Principle: the state where the greater part of evidence is found

2) Nationality Principle: the state of residence or nationality of the accused

3) Passive Personality Principle: the state where the economic impact of the offense is the greatest
An Image of the EPPO

A decentralized, cost-efficient structure

(Based on the Commission Proposal published in July 2013)

- A decentralized structure integrated into national judicial systems
- Cost-efficient structure based on existing resources
- National courts will be entrusted with the judicial review on the European Public Prosecutors' acts
- Strong procedural rights from the protection of human rights point of view such as: the right to remain silent and to be presumed innocent, to legal aid, to present evidence, and to hear witnesses
Structure of the EPPO Green Paper Model

- Chief Public Prosecutor: EPPO
- Deputy Public Persecutors in each Member State

In order to secure a tied link between the EU mechanism and the National legal systems
2001 Green Paper Model

Referral

Figure 1

Structure of European Public Prosecutor
1. Information/Referral

Member State I
- Administration
- Police
- National Prosecution Service
- Deputy European Prosecutor
- Judge of Freedoms

Member State II
- Administration
- Police
- National Prosecution Service
- Deputy European Prosecutor
- Judge of Freedoms

Member State III
- Administration
- Police
- National Prosecution Service
- Deputy European Prosecutor
- Judge of Freedoms

Common investigation/prosecution area

This table does not reflect a specific institutional structure but a functional structure in the Member States. It does not express a view on the authority exercising the national prosecution function or the judge of freedoms.
2001 Green Paper Model Investigation

2. Investigation stage

Figure 2

(1) = Acts of investigation in the European Public Prosecutor’s discretion/Legal effect in common area
(2) = Acts of investigation reviewable by judge of freedoms
(3) = Acts of investigation ordered by judge of freedoms

Common investigation/prosecution area
The acts of investigation are given by way of example
3. Prosecution stage

Member State I
Administration
Police
National Prosecution Service
Deputy European Prosecutor
Committal Court

Member State II
Administration
Police
Joint prosecution
National Prosecution Service
Deputy European Prosecutor
Committal Court

Member State III
Administration
Police
National Prosecution Service
Deputy European Prosecutor
Committal Court

Principal prosecution
(1) = Committal for trial
(2) Case closed
(3) Settlement

Common investigation/prosecution area

Preferred solution: single court. The European Public Prosecutor could also commit for trial in several Member States.

Figure 3
Post Lisbon Treaty

Pre-Lisbon Pillar Structure

- Treaty on European Union
- CFSP
- Pillar One
- TEC
- More Surpanational
- More Intergovernmental

Post-Lisbon Structure

The Lisbon Treaty

- Treaty on European Union
- CFSP
- Pillar Three
- TEC
- More Surpanational
- More Intergovernmental
- Treaty on Functioning of the European Union
- Police and Justice Cooperation
- European Communities

Picture 2
Does the EPPO have an Intergovernmental or Supranational nature?

- **The EPPO still has Intergovernmental nature?**
  - 2002 Framework decision of the European Warrant Arrest etc. ?
- **Or does it have Supranational nature?**
  - Elimination of the third pillar system after the Lisbon Treaty Article 67 (3)of the TFEU guarantees the high security of ,
  - Police and Judicial matters have been moved to the shared competence
  - but not explicitly mentioned in Article 86
  
→ Perhaps lack of consensus during the negotiation of Lisbon Treaty ?

: Emergency Clause: Counter-balance of Opt-out System
:Article 86 (1) second paragraph.
Challenging: Decision making - Article 86 (1) Emergency Clause

- The Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust. **The Council shall act unanimously** after obtaining **the consent of the European Parliament.**

  *(Emergency Clause)*

- **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.

- 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.
Draft Model 2012/ Referral

Figure 4
Draft Model 2012/ Investigation 1
Non Coercive

Figure 5
Draft Model 2012/ Investigation 2

Coercive with Prior Judicial Authorisation

Figure 6
Draft Model 2012/ Investigation 3
Coercive without Prior Judicial Authorization

Figure 7
Draft Model 2012/ Prosecution

Figure 8
3. Article 86 of the TFEU

• In order to combat crimes affecting the financial interests of the Union, the Council [...] may establish a European Public Prosecutor's Office (EPPO) from Eurojust.

Why was the term ‘may’ used instead of ‘shall’?
Research Question: Which organization would undertake the creation of the EPPO?

Candidates for the future EPPO:

1. *Europol* – European Police Office

2. OLAF – L’Office de Lutte Anti Fraude

3. Eurojust – European criminal judicial cooperation unit?
Candidate 1: Europol

**Pros**
- Shared competence with the EPPO
- Cooperative organ with the EPPO-Article 86(2)
- Experience and knowhow of coordination in the EU

**Cons**
- Does not have a *motu proprio* investigation powers either executive powers in accordance with Article 88(2)(b)
- Solely having an Intergovernmental Organization

**Conclusion:**
Europol would not be the main but the cooperative organization with the EPPO at an investigating and a prosecuting stage
Candidate 2: **OLAF**

**Pros**
- Overlapped competence with the EPPO (Article 325)
- Administrative *motu proprio* investigative power (Partly Supranational) – human Rights concept should be more considered
- Long experience and knowhow of fraud in the EU

**Cons**
- Lack of criminal investigation power
- Its recommendations do not have affect criminal proceedings of the MS
- Does not have executing either prosecuting powers

**Conclusion:**
- OLAF can be the main organization but needs to improve procedural matters in regard to administrative investigation
Institutional law Matters:  

**OLAF** and **EPPO**: My point of view

- The *OLAF*’s tasks are basically conferred by Article 325 (Combating Fraud) of the TFEU since this comes from the **First pillar (more supranational)** before the Lisbon Treaty
- **OLAF** is more close to **the EC**
- Whereas, the **EPPO**’s tasks are addressed in Article 86 in Chapter 6: Judicial cooperation in criminal matters which is dealt with by **Former Third Pillar (Intergovernmental)**
- **EPPO** is more close to **the Council**
  → the institutional matters should be solved
Candidate 3: **Current Eurojust**

**Pros**
- Overlapped competence with the EPPO
- Number of experiences and knowhow of judicial coordination in the EU

**Cons**
- Does not have *motu proprio* investigation power either executive powers - solely Intergovernmental Organ

**Conclusion:**

**Eurojust** would not be the main but cooperative organ with the EPPO
Candidate 3: **Future Reformed Eurojust (Article 85)**

**Pros**
- Increased competence: overlapped competence with the EPPO
- Article 86 states the EPPO may establish from Eurojust
- Motu proprio Criminal investigation in Article 85 (1)

**Cons**
- To what extent Eurojust have motu proprio criminal investigation
- No executive powers

**Conclusion:** Future Reformed *Eurojust* would be the most suitable organization for the EPPO
Conclusion of RQ: Which organization would undertake the creation of the EPPO?

1. Europol- would not be the main organization but a strong cooperative organization with the EPPO
2. EPPO- can be merged with OLAF
   OLAF would become the main part of EPPO organization at an investigating stage
3. Current Eurojust- would not be the main organization but a strong cooperative organization with the EPPO
4. Future reformed Eurojust- would be the most suitable organization
Conclusion: EPPO Project

- The establishment of the EPPO is feasible but numerous reforms and changes are necessary.
- Close cooperation of EPPO and OLAF is indispensable – Institutional law problems should be solved.
- *Eurojust* reform adding an investigating power in accordance with Article 85 is crucial.
- Complexity of the decision making process’ Unanimity of the Council and the Consent of the EP
Recent Movement:
Q1: Would the U.K. Opt-Out of the EU criminal measures?
Q.2 Is it Relevant to the EPPO project?

A1. As of July 2013, the U.K would opt out of EU policing and criminal justice in accordance with Protocol 36 of the TFEU. However, the scope of the U.K opt-out is limited to the remaining Third Pillar measures before the CJEU acquires jurisdiction

A2. Therefore, the U.K opt out under Protocol 36 of the TFEU would not directly link to the EPPO project unless the U.K. breaks away the EU membership.
As to the police and criminal measures after the Lisbon Treaty

The U.K and Ireland will not participate unless they voluntarily and explicitly decide to do so (opt in) in accordance with Protocol 21 of TFEU.

Denmark will not either participate in the European Public Prosecutor's Office in accordance with Protocol 22 of TFEU.
Thank you for your attention.

Questions ?
References:

• K Moriguchi ‘The Establishement of the European Public Prosecutor’s Office after the Lisbon Treaty’, September 2012, Institute of European Studies, Free University of Brussels

• Center for European Legal Studies `CELS Working Paper No.1 Opting out of EU Criminal law: what is actually involved`, September 2012, Cambridge University

• Picture 1  http://www.dadalos-europe.org/int/grundkurs4/zjip.htm

• Picture 2 http://hum.port.ac.uk/europeanstudieshub/learning/understandingtheeu/module-5-history-of-the-european-union/maastricht/

• Figure 1-3  European Commission ‘Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor’ COM (2001) 715 final p.88-90

• Figure 4-8 Université du Luxembourg ‘Projet de règles modèles européennes de procédure pénale’(2012)