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The need for the European Public Prosecutor's office and related problems

Abstract: Since the entrance into force of the Lisbon Treaty the pillar system was abolished and matters on judicial co-operation in criminal matters including police co-operation are treated under the co-decision procedure and qualified majority voting. The main actors established by the European Union in the area of freedom, security and justice are European Police Office (Europol), the European Union's Judicial Cooperation Unit (Eurojust) and European Anti-Fraud Office (OLAF). However, the Union acknowledges the need to establish the European Public Prosecutor's office in order to combat financial fraud concerning the budget of the European Union to and bring more transparency to this issue. The Lisbon Treaty provides a possibility to set-up a European Public Prosecutor Office from Eurojust, nevertheless such organizations as Europol and OLAF shall be taken into account before the office takes it full activities in order to avoid duplications of the mandates and functions.

Keywords: Lisbon Treaty, The European Public Prosecutor's Office, Europol, Eurojust, OLAF.

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Par Eiropas Prokuratūras izveidošanas nepieciešamību un ar to saistītās problēmas

Anotācija: Kopš Lisabonas līguma stāšanās spēkā, ir ieviestas izmaiņas vienošanās līgumā par Eiropas Savienību, kas reformē ES vadības sistēmas. Šodien jautājumi par tiesu iestāžu sadarbību krimināllietās, tostarp policijas sadarbību, tiek izskatīti saskaņā ar koplēmuma procedūru un balsu kvalificētu vairākumu. Galvenās darbojošās personas, ko Eiropas Savienība ir noteikusi brīvības, drošības un taisnīguma telpā, ir – Eiropas policijas birojs (Eiropols), Eiropas Savienības tiesu varas iestāžu sadarbības institūcija (Eiropjusts) un Eiropas birojs krāpšanas apkarošanai (OLAF). Tomēr Eiropas Savienība atzīst nepieciešamību izveidot Eiropas prokuratūras pārstāvniecības biroju cīņā ar finanšu krāpniecību no ES budžeta līdzekļiem. Lisabonas līgums paredz Eiropas prokuratūras biroja izveidi sadarbībā ar Eiropjust. Tāpat ir jāņem vērā tādas organizācijas kā Eiropols un OLAF, ar kurām nepieciešams saskaņot Eiropas prokuratūras biroja darbību un izvairīties no pilnvaru un funkciju dublēšanās.

Atslēgvārdi: Lisabonas Līgums, Eiropas prokuratūras birojs, Eiropols, Eiropjusts, OLAF.

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О необходимости создания Европейской Прокуратуры и связанных с этим проблемах

Аннотация: Вступивший в силу Лиссабонский договор внес изменения в соглашение о Европейском Союзе, реформирующие системы управления ЕС. Сегодня вопросы судебного сотрудничества по уголовным делам, включая полицейское сотрудничество, рассматриваются в рамках процедуры совместного принятия решений, путем голосования квалифицированным большинством. Главными действующими лицами, установленными Европейским Союзом в области свободы, безопасности и справедливости, являются Европейское полицейское ведомство (Европол), Раздел Европейского Союза по судебному сотрудничеству (Евроюст) и Европейское бюро по борьбе с мошенничеством (ОЛАФ). Тем не менее, Союз признает необходимость в создании представительства Европейской прокуратуры, в целях борьбы с финансовым мошенничеством по отношению к бюджету Европейского Союза. Лиссабонский договор предусматривает возможность создания Европейской прокуратуры от Евроюста. Также, такие организации как Европол и ОЛАФ должны быть приняты во внимание прежде, чем офис прокуратуры приступит к деятельности, для избежания дублирования мандатов и функций.

Ключевые слова: Лиссабонский договор, Европейская прокуратура, Европол, Евроюст, ОЛАФ.

Introduction

The European Union (hereinafter EU) is moving more towards a political path; rather than it was before, with its prime aim to integrate as an economic entity on a regional level. This can be argued by the fact that the initial Maastricht [1], Amsterdam [2] and Nice Treaties with supplementing protocols [3] led to the adoption of the Lisbon Treaty [4] and the incorporation of important changes such as the abolition of the pillar structure and the facilitation of the establishment of an area of freedom, security and justice (hereinafter the AFSJ). Additionally, for the first time under Article 86 of the Treaty on the Functioning of the European Union (hereinafter TFEU) [5] there was incorporated a legal basis for the possible establishment of the European Public Prosecutor's Office (hereinafter the EPPO), a proposed body which has been discussed for more than 10 years in the European regional arena.

This paper aims to analyze the sufficiency of the proposed EPPO, in a time where criminal justice is overseen, regulated and facilitated by existing bodies such as the European Police Office (hereinafter Europol), European Union's Judicial Cooperation Unit (hereinafter Eurojust) and the European Anti-Fraud Office (hereinafter OLAF). The main purpose of the paper is to discuss actors operating in the AFSJ and discuss whether the EPPO should be created and how the roles and legal frameworks of the actors should be amended in order to complement each other better.

The actors operating in the AFSJ

Today there are three main actors operating in the AFSJ, namely Europol, Eurojust and OLAF. The distinction among those actors should be drawn in order to understand whether there exists a real need for the EPPO.

EUROPOL

The idea for Europol was firstly expressed by German Chancellor Mr. Helmut Kohl in a proposal made in 1991 at European Summit in Luxembourg [6]. In 1992 an agreement on establishing Europol was reached. Later, in 1995, the Europol Convention was agreed upon by 15 EU member states and came into force in October 1998. A year later in July Europol took up its full activities in The Hague [7].

Europol is known as an EU law enforcement organization which exchanges criminal intelligence with the aim to improve the effectiveness and co-operation between the authorities of the member states, in order to prevent and combat cross-border organized crime and terrorism. In Article 88 TFEU, Europol's mission is to support and strengthen action by the member states police authorities and other law enforcement services and their mutual co-operation preventing serious crime with a cross-border element. Additionally, under Europol's Decision [8] Article 5, Europol is mandated to the collection, storage, processing, analyzing and exchanging information and intelligence; to notify the competent authorities of the member states of information concerning and aiding investigations in the member states. Europol's officials do not actually have any police powers and are not authorized to conduct investigations; they have a more advisory function.

In 2013 the Commission brought a new Proposal on Europol [9] into public with the aim to achieve more democratic legitimacy and accountability of Europol to the European citizen [9, Section 3]. The Proposal suggests for Europol to overtake current tasks of the European Police College (hereinafter CEPOL) in the area of training of law enforcement officers and advises that Europol would have full independency in data protection, with sufficient powers for intervention. The interesting point is that the Proposal does not address possible co-operation between Europol and the EPPO.

EUROJUST

In the late 90's the idea of a counterpart to Europol emerged. On the basis of the Action Plan to Combat Organized Crime in 1998, was the first operational mechanism for judicial co-operation in the EU, namely the European Judicial Network

(hereinafter EJM) was created [10, 310]. The EJM was gathering together legal practitioners from the member states in order to work on bilateral and multilateral cases, by using its members as contact points. The judicial co-operation unit was first introduced at a European Council Meeting in Tampere, Finland, in October 1999. The idea of establishing some form of prosecutorial unit was developed in the Council Secretariat by the Directorate-General for Justice and Home Affairs (former third pillar), with the conclusion to establish a European Judicial co-operation Unit, namely Eurojust, as a counterpart to Europol. In 2000, Council a forerunner to Eurojust, namely Pro-Eurojust, was created with the aim to serve as an experimental unit, a module to try and test, before permanent Eurojust could become effective (Pro-Eurojust, similarly to current Eurojust, was operating as a sounding board for prosecutors from all member states) [10, 310]. The establishment of Eurojust was complex and time-consuming, but the 9/11 terrorist attacks in the United States served as a catalyst for its establishment. In December 2001, the Council agreed upon the establishment of Eurojust, and consequently based on the Council Decision set up Eurojust [11]. In 2002, Eurojust started its activities in The Hague.

In comparison Eurojust's mission is to support and strengthen coordination and co-operation between national investigating and prosecuting authorities in relation to serious crime affecting two or more member states. Such co-operation speeds up investigations, prosecutions and trials. Co-operation often starts with a mutual legal assistance request, a legal document containing a request for help or exchange of information, in order to conduct efficient investigations, meet witnesses, or victims. Another function of Eurojust is to organize co-ordination meetings among member states that are involved in the case, with the aim to gather police officers, prosecutors, and investigative authorities to discuss efficient ways of conducting investigations and solving the case. However, the national members of the College of Eurojust cannot initiate prosecutions under Eurojust Decision. Therefore, either powers of investigation should be provided to the College or the future EPPO should take over this responsibility.

Article 13 of the Council Decision on the strengthening of Eurojust emphasizes that Eurojust shall provide member states with information and feedback [12] and according to Eurojust's Annual Report 2011 Eurojust responded to member states' requests for assistance in 1,441 registered cases [13]. The number of cases dealt with in co-ordination meetings rose to 204, an increase of 44% over 2010. However, Eurojust is still struggling with the slow execution of mutual legal assistance requests.

With respect to future challenges, the presented Proposal on Eurojust [14]. The Proposal is the main actor in the possible future reformation of Eurojust's internal structure and the possible governance structure of the College. Additionally, the Proposal addresses specific arrangements for involving the European Parliament and national Parliaments in the evaluation of Eurojust's activities, so that visibility and transparency of its activities will be increased.

Finally, the Lisbon Treaty states that the EPPO shall be established from Eurojust, but it does not mention specifics concerning the EPPO's structure. However, it is clear that Eurojust would be connected to the EPPO.

OLAF

The first calls [15] for the establishment of a team of experts burdened with carrying out on-the-spot checks in cases of suspected fraud against the financial interests of the European Communities go back to 1980's [16, 331-336]. The need for better coordination of its various units dealing with the combat of fraud within the Commission's structure was expressed in Report from the Commission on tougher measures to fight against fraud affecting the Community Budget [17]. The Report pointed out the need to setting up the anti-fraud coordination unit [17, Section 38] named *Unité de Coordination de la Lutte Anti-Fraude*, known as UCLAF, which became operational in July 1988 [18, 2]. At that time UCLAF was empowered with internal and external checks in cases of suspected financial frauds, however UNCAL did not manage to respond to the need for effective protection of the EU financial interests due to the lack of detailed regulation of obligations and processes [18, 5]. Therefore,

UCLAF was replaced by Decision on OLAF [19], which investigated OLAF with more regulated powers to the fight against fraud, corruption and any other illicit activity adversely affecting the financial interests of the Community. OLAF has full independence from the Commission, as introduced by Article 3 of that Decision and is empowered to take internal and external administrative investigations.

The purpose of these investigations is the co-ordination of the operation [20] through the organization of the operation, the analysis of the collected facts, and the provision of technical support to the EU and the national authorities involved in the investigation [18, 27], which makes it possible for OLAF to have a direct contact with national police officers and judicial authorities. Therefore, OLAF plays an important role in the co-operation of the police and judicial authorities of the member states, which are obliged under Article 325 TFEU to counter fraud and any other illegal activities affecting the financial interests of the Unions.

According to Commission's Decision [21], OLAF shall exercise the Commission's powers to carry out external administrative investigations and shall be responsible for carrying out internal administrative investigations intended to combat fraud, corruption and any other illegal activity adversely affecting the EU's financial interests [21, Article 1(1) first and second subparagraph]. It shall be emphasized that the national procedural rules of the MSs in which OLAF investigators conduct an external investigation determines to a large extent the way in which this investigation can be carried out, which consequently multiplies the possible grounds for challenging the legality of investigations [22, 67]. In other words, the enforcement of those conducted external investigations depends on the assistance of the MSs.

By the way of contrast, OLAF Regulation [23] underlines administrative nature of OLAF investigations, endorses the distinction between external and internal investigations [23, Article 2]. However, OLAF's investigations may exceed this scope since their objective may also be, regarding external administrative investigations, to fight against any other act or activity by operators

in breach of EU provisions [24]. It is worth to mention that Regulation provides a legal basis for OLAF investigations only within the scope of the protection of the EU's financial interests. In order to function efficiently, it is necessary to group all powers together in one legal document. However, it is very unlikely considering the difficulties in adopting amendments to the OLAF Regulation [25]. The future of OLAF lies in the hands of the EU and MS when deciding on the creation of the EPPO as EPPO will affect OLAF's functioning.

In case the EPPO is established, the current role and functioning of OLAF will be significantly affected, as the EPPO would overall criminal investigative competences of OLAF [26, 371]. Clear arrangements concerning the separation of powers are vital.

The necessity of European Public Prosecutor's Office

Discussions on creation of the EPPO take over 10 years already. Firstly the EPPO was mentioned in Corpus Juris, namely a research and analysis document prepared by academics and practitioners where they were asked by the Commission whether the investigations and prosecutions on the fraud in the European budget were adequate. The Commission's Green Paper recommended a treaty amendment to permit the EPPO creation with the prime function to direct and coordinate investigations and proceedings with a view to protecting the Community's financial interests.

Particularly, the TFEU gives a possibility to create the EPPO; however, it is not an obligation [5, Article 86(2)]. Creation of the EPPO asks for unanimity voting of the Council after obtaining the consent of the European Parliament or at least 9 MSs enhanced cooperation [5, Article 86(1)]. Additionally, due to the exact wording of Article 86(1) the EPPO may be established «from Eurojust» which is ambiguous on the grounds that Eurojust will continue operating after the establishment of the EPPO. Another issue is that Eurojust covers seriously organized crimes, co-ordinates national investigations and prosecutions, improves co-operation between national authorities, facilitates extradition and mutual assistance requests and supports effectiveness of national investigations

and prosecutions, and is not confined to offences involving a fraud on the EU budget. However, Eurojust has no jurisdictional powers. On the other hand, Europol's competences are not that of an operational police force and investigation powers remain under exclusive competence of MS. However, the TFEU provides that the main responsibilities of the EPPO would be investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol [5, Article 86(2)]. The investigation tools of OLAF remain in theory of an administrative nature and do not include criminal investigations, which are essential in financial matters. Moreover, OLAF's investigations do not extend to the prosecution phase. Therefore, setting up the EPPO would give more strength to the judiciary to control police and administration devices in particular databases.

The positive aspect establishing the EPPO is that organ would be centralized Union-wide investigative authority, empowered to investigate and bring cases regarding financial crimes the courts of MSs'. In other words the EPPO will afford better and more systematic protection of the EU budget from fraud than is afforded by member state public prosecutors. By the way of contrast, the Council may expand the limits of the EPPO, and therefore, it would be possible to operate across borders and thus including wider range of crimes, particularly crimes on drug and people trafficking [27]. Negative side of the EPPO creation this is that there is no single European Criminal Court and no European Criminal Code adopted yet. Thus, there is a lack of reviewing the EPPO actions. Solution to this may be based on «the resolution of conflicts of jurisdiction». However, it is still an open debate.

How should roles and legal framework of Europol, Eurojust and OLAF be changed in order to complement with the EPPO?

Each of actors has its own mandate and powers to pursue the objectives in the AFSJ. I believe that Europol, Eurojust and OLAF should not be changed to be able to complement the EPPO, for instance, Eurojust is effective in investigations and prosecutions, however is does not cover fraud in respect of EU finances. Whereas, Europol has a mandate to combat financial fraud, and OLAF

is responsible for carrying out administrative and operational investigations in particular sphere. Undoubtedly, that the creation of the EPPO might overlap with actors operating in the AFSJ, nevertheless the EPPO may be empowered with additional powers such as being able to bring cases before the courts of MSs and may have an authority to direct and coordinate the work of domestic judicial institutions, the European Judicial Network authorities and OLAF, where, for instance, OLAF is in lack of bring cases before the courts. Finally, it is worth to mention the possibility of expanding the limits of the EPPO powers when the Council might deem so necessary, however, the sovereignty of countries on one hand, and co-dependency on the other hand should taken into account. Finally, too many overlaps and duplications in legal frameworks may lead to adverse effects and ambiguity on who has to do what.

Conclusion

The possibility of establishing EPPO in order to secure the AFSJ is discussed over 10 years, and no solution has been yet adopted, because of complexity and time consuming communications. Europol, Eurojust and OLAF are the main actors operating in the AFSJ. It can be found that their tasks overlap, in some cases duplicate, however all of them pursue the main goal – combat crimes and secure the AFSJ. The creation of the EPPO may lead to novelties, such as establishing European Criminal Court and adopting single European Criminal Code. Nevertheless we should not forget the sovereignty of states to conduct criminal matters individually. All in all, I believe that legal frameworks of actors should not be amended until it does not lead to vagueness, misunderstanding and improper functioning of players. Consequently the EPPO should be established in order to supplement actors and pursue the objective of secure AFSJ.

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