

## Prosecuting EU Financial Crimes: The European Public Prosecutor's Office in Comparison to the US Federal Regime

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### Abstract

Why is the fight against financial crimes such a central task for the EU? The EU has a strong interest to counter financial crimes and fraud against the EU budget as those crimes—so the EU legislator's claim is—hamper the trust in the market and undermine consumer confidence to engage in internal market transactions. In this Article, we aim to discuss the establishment of the European Public Prosecutor Office as a federal agent and the effects of this agent for establishing a robust EU financial crimes regime. Comparisons with the US system of US Attorneys—federal prosecutors—will be drawn to show that this institution has been quite effective at enhancing the protection of US financial market. The Article will then discuss to what extent the EU can, and should, learn from the American experience. We are particularly interested in the strong security focus in the EU and its consequences when it ventures into the area of financial crimes.

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## A. Introduction

In this Article, we explore some of the current regulatory challenges in EU financial crimes practices and EU market regulation by focusing on the recent establishment of a European Public Prosecutor Office—EPPO.<sup>1</sup> The idea behind the creation of an EPPO is perhaps one of the most contested EU criminal law measures in recent years and one which originates from the longstanding idea of creating a comprehensive EU anti-fraud regime. This EU mission of constructing its own prosecutor has lasted for over two decades, with the EPPO as representing something of a *pièce de résistance*, with legal consequences spanning both the EU criminal law domain and the internal market. As such the EPPO is a follow-up to the previous *Corpus Juris* project.<sup>2</sup> The EPPO regulation was recently adopted, but prior to its enactment, it had triggered two yellow cards in the legislative process with regards to the earlier proposals for this legislation.<sup>3</sup> Eventually the EU Commission resorted to enhanced cooperation, a flexible mode of integration where not all Member States participate in the legislative measure—but at least nine Member States do—and this has attracted a lot of attention and debate in EU law scholarship.<sup>4</sup>

Specifically, in this Article we will discuss some of the legal implications of the establishment of the EPPO and in particular, the potential of this agent for establishing a robust financial crimes regime across the EU. In addition, we will look at the security dimension of the EU's legislative powers in this area. We argue that the EU's approach to fighting financial crimes is closely connected to the general security theme of the EU—"Area of Freedom, Security and Justice" (AFSJ)—as well as to the EU legislators' goal of improving market integrity and consumer confidence in the internal market. Therefore, as we try to show in this Article, it would be consistent with other EU policies to expand the current jurisdiction of the EPPO to cover a wider area than simply the EU budget. This Article argues to extend the EPPO jurisdiction to comparable areas included within the jurisdiction of the US system of US Attorneys.

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<sup>1</sup> Commission Regulation 2017/1939 of Oct. 12, 2017, Implementing Enhanced Cooperation on the Establishment of the European Public Prosecutor's Office, 2017 O.J. (L 106) 1, 1-71 [hereinafter EPPO].

<sup>2</sup> *E.g.*, MIREILLE DELMAS-MARTY, THE IMPLEMENTATION OF THE CORPUS JURIS IN THE MEMBER STATES (John Vervaele ed. 2000).

<sup>3</sup> Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community art. 12(b), Dec. 13, 2007, 2007 O.J. (C 306) (providing for a competence of national Parliaments to see that the principle of subsidiarity is respected in accordance with Protocol No. 2) [hereinafter Treaty of Lisbon].

<sup>4</sup> *See e.g.*, JACOB ÖBERG, LIMITS TO EU POWERS: A CASE STUDY OF EU REGULATORY CRIMINAL LAW ch. 7 (2017) (On the adoption of the EPPO Regulation). It should be recalled that before the Lisbon Treaty entered into force, the enhanced cooperation mechanism was almost impossible to use. This was a result of the very high procedural thresholds that were in place, which took the form of restrictions regulating such cooperation.

Additionally, given the current prosecution discretion granted to the EPPO, we will highlight the heavy criticism that has been levied against the raw discretionary power of the American federal prosecutors.

Against the backdrop of the broader issues of the establishment of the EPPO, it is the contention of this Article that the EU is in need of a more detailed empirical account of what occurs in practice. This is especially true when looking at the regulatory challenges the EU is facing when legislating on financial crimes as part of the AFSJ venture. As noted, the EU has a very strong interest in countering financial crimes, as it could potentially undermine the confidence in the market and its realization as an “honest” market place. Financial crimes are generally any kind of criminal conduct relating to money or to financial services or markets.<sup>5</sup> As will be shown, there is also a strong security dimension to the EU’s fight against financial crime. For example, terrorism is often financed through laundered money. In addition, the claim of the EU legislator is that the occurrence of financial crimes within the EU territory could—and does—harm the EU budget.

Within this complex mixture of security concerns and the EU mission to establish a “clean” market, the establishment of the institute of EPPO represents a pertinent example of possible challenges in this area as it, *inter alia*, keeps the criminal law of defense on a national level and moreover grants the EPPO very limited enforcement powers.<sup>6</sup> There is then a curious relationship between the establishment of the EPPO and that of the EU security mission. The question is how to reconcile the EPPO with the constitutional questions in the EU. Crucial constitutional principles in the EU framework are of course, *inter alia*, competence allocation, subsidiarity, proportionality, and fundamental right protection.<sup>7</sup> Those axioms are important for the general understanding of the relationship between the EU mission to fight financial crimes and that of the security project of the AFSJ and should be kept in mind. This is especially true considering that Member State security is to a large extent a national competence under Article 4.2 Treaty of the European Union (TEU).

This Article is structured as follows. First, we will discuss the broader questions of the establishment of the EPPO and how it fits into the EU world of security governance and anti-financial crimes policies. Second, we will look more closely at what the EPPO Regulation properly entails. Subsequently, we will discuss the possibilities of extending the jurisdiction of the EPPO to EU financial crimes in general, as well as the question of data protection and

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<sup>5</sup> See *e.g.*, Financial Services and Markets Act 2000, c. 8 (Eng.), <https://www.legislation.gov.uk/ukpga/2000/8/contents>.

<sup>6</sup> EPPO, *supra* note 1, at 1-71.

<sup>7</sup> See *e.g.*, STEPHEN WEATHERILL, LAW AND VALUES IN THE EUROPEAN UNION (2016); GRAINNE DE BURCA AND PAUL CRAIG, THE EVOLUTION OF EU LAW (2011); TAKIS TRIDIMAS, GENERAL PRINCIPLES OF EU LAW (2011).

profiling. Finally, we will discuss the EPPO in a comparative context by looking at its similarities and differences with the American federal prosecutor.

### **B. Prosecuting EU Financial Crimes as Part of the Wide Grid of EU Security Governance**

The establishment of the EPPO represents one of the latest layers in the EU's measures to fight financial crime, but before looking in further detail at this prosecutor, we need to ask why the fight against financial crimes is such a central task for the EU. As mentioned above, the EU has a strong interest in countering financial crimes and fraud against the EU's budget as these crimes hamper the trust in the market and often—so the EU legislators claim is—undermine consumer confidence to engage in internal market transactions.<sup>8</sup> Specifically, the underlying objective of the EU's involvement in the fight against financial crime and market abuse more generally is to boost investor confidence and thereby contribute to the functioning of the internal market—for example through harmonization under Article 114 Treaty of the Functioning of the European Union (TFEU).<sup>9</sup> The idea is moreover that investors and consumers would be discouraged if the EU budget is corrupted.<sup>10</sup> There are then, multiple reasons for the EU to be actively engaged in the countering of financial crimes: From the functioning of the market and increasing consumer confidence in the market, to protecting the EU's budget against fraud. These are distinct, albeit interrelated goals, for the EU legislator. In particular, the occurrence of financial crimes has—since the early days of the EU—been considered as constituting one of the main threats to the establishment of the internal market.<sup>11</sup> For example, the legislative carousel on the market abuse regime—the anti-money laundering scheme—and the question as to why the suppression of financial crimes is relevant in EU law, offer good examples of a longstanding case of cross-over competences between the AFSJ and the internal market sphere.<sup>12</sup>

With the global financial crisis in 2008, the fight against white collar crime and fraud against the EU budget was intensified and as such has been considered a priority for the EU as a crisis management tool.<sup>13</sup> A decade later, in 2018, the priority of fighting financial crimes is still high on the agenda, but with an added considerably increased security dimension by also tackling the threat of financing of terrorism and related activity to a greater extent—as

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<sup>8</sup> NIAMH MOLONEY, *EU SECURITIES AND FINANCIAL MARKETS REGULATION* (2014).

<sup>9</sup> See e.g., Commission Regulation 596/2014 of April 16, 2014, Market Abuse Regulation and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives, 2014 O.J. (L 173).

<sup>10</sup> EPPO, *supra* note 1, at 59.

<sup>11</sup> See DELMAS-MARTY, *supra* note 2.

<sup>12</sup> See e.g., Ester Herlin-Karnell, *White-Collar Crime and European Financial Crises: Getting Tough on EU Market Abuse*, 37 *EUR. L. REV.* 487 (2012).

<sup>13</sup> See contributions by Maria Bergström and Nicholas Ryder in this special issue of the German Law Journal.

compared to the legislation adopted in the aftermath of 9/11.<sup>14</sup> In addition, there is an overlap—or hybridity—in legal sources not only between the EU’s internal market policies and the growing importance of the AFSJ, but also in relation to the external dimension of the EU. This is because a majority of the measures currently adopted to fight the financing of terrorism and financial crimes in the EU partially fall within the remit of international norms that are being adopted by the EU—for example, the Financial Action Task Force.<sup>15</sup>

Moreover, the EU’s strategy to fight irregularities in the market should be seen in light of the history of the debate on the competences of the EU to enact criminal law. Before the EU asserted a competence with the Lisbon Treaty in place—Article 83 TFEU—it was necessary for the EU to tie its claimed authority to the internal market and thereby adopt administrative sanctions—that were very close to criminal law penalties—to increase the effectiveness of the system.<sup>16</sup> As one of us previously charted in the *German Law Journal*, the EU sanctions regime is built around the notion of regulatory powers involving different actors and processes—often through administrative sanctions rather than criminal law.<sup>17</sup> While much has been said about the purpose of fighting financial crimes within the internal market,<sup>18</sup> much less has been said with regard to the impact of these findings and enforcement questions within the AFSJ. Recent examples of directives that illustrate the EU’s activity in the area, are the aforementioned MAD Directive,<sup>19</sup> the related MAR regulation,<sup>20</sup> and the Fourth Money Laundering Directive.<sup>21</sup> These were based on Article 83 TFEU and Article 114 TFEU respectively. The Fourth Money Laundering Directive is about to be superseded soon, however. The EU recently adopted a proposal for a Fifth Money Laundering Directive.<sup>22</sup> The Fifth Money Laundering Directive sets out a series of measures

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<sup>14</sup> *Id.*

<sup>15</sup> Financial Action Task Force, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation* (2012), <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf>.

<sup>16</sup> See CARLOS GÓMEZ-JARE DÍEZ, *FEDERAL EUROPEAN CRIMINAL LAW* (2015).

<sup>17</sup> See Ester Herlin-Karnell, *Constructing Europe’s Area of Freedom, Security, and Justice through the Framework of “Regulation”: A Cascade of Market-Based Challenges in the EU’s Fight Against Financial Crime*, 16 *GERMAN L.J.* 49, 71 (2015).

<sup>18</sup> See e.g., CHRISTOPH STEFANOÛ & HELEN XHANTHAKI, *FINANCIAL CRIME IN THE EU* (2005).

<sup>19</sup> See DELMAS-MARTY, *supra* note 2.

<sup>20</sup> See HERLIN-KARNELL, *supra* note 12.

<sup>21</sup> Directive 2015/849 of the European Parliament and of the Council of 20 May 2015 on the Prevention of the use of the Financial System for the Purposes of Money Laundering or Terrorist Financing, Amending Regulation No 648/2012 of the European Parliament and of the Council, 2015 O.J. (L 141) 73.

<sup>22</sup> *Commission Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the Prevention of the use of the Financial System for the Purposes of Money Laundering or Terrorist Financing and Amending Directive 2009/101/EC*, COM (2016) 185 final (July 5, 2016). Directive (EU) 2018/843 of

to better counter the financing of terrorism and to ensure increased transparency of financial transactions and of corporate entities under the preventive legal framework in place in the Union.

Likewise, the EU Security Agenda 2015 is crucial here.<sup>23</sup> In short, the EU's Security Agenda identifies, *inter alia*, three priorities for the EU: Fighting terrorism and its financing, organized crime, and the suppression of cybercrime. To address these threats, the Security Agenda claims to strengthen and increase both the effectiveness of information exchange and operational co-operation between Member States, EU Agencies, and the IT sector. Significantly, however, terrorism also encompasses online activity, not necessarily just physical movement across the EU—which is stressed in the new counter Terrorism Directive 2017.<sup>24</sup> While this remains an important task, there should be a critical debate on how the EU could construct an AFSJ that integrates its mission of establishing an effective response to the growing global security threat posed by the unstable situation in the world with the EU values of human rights and promotion of justice. In other words, the phenomenon of globalization also affects the EU and the constitutional structure for addressing these problems and needs to uphold the rule of law and values—Article 2 Treaty of the EU. The Security Agenda tries to address this complex issue by stressing the need for more joined-up inter-agency cooperation and a cross-sectorial approach.<sup>25</sup>

Given the increased nexus between different types of security threats and policy, action on the ground must—according to the previously mentioned Security Agenda—be fully coordinated among all relevant EU agencies and institutions. Particular law enforcement agencies—such as Europol and Eurojust—provide a specialized layer of support and expertise for Member States and the EU. According to the Security Agenda, they function as information hubs, help implement EU law, and play a crucial role in supporting operational cooperation, such as joint cross-border actions.<sup>26</sup> There is, at present, a wide-ranging debate as to what extent these agencies can be held accountable and their legitimacy as key players

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the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, 2018 O.J. (L 156) 43-74.

<sup>23</sup> See *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions on The European Agenda on Security*, COM (2015) 185 final (Apr. 28, 2015).

<sup>24</sup> See Directive 2017/541 on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and Amending Council Decision 2005/671/JHA, 2017 O.J. (L 88) 6-21.

<sup>25</sup> See *id.* (as pointed out in the EU Security Agenda).

<sup>26</sup> See *id.*, at 4 & 9.

in the AFSJ regime.<sup>27</sup> The establishment of the EPPO is now added to the controversy of the trend of “agencification” in the EU treadmill.

Consequently, the EPPO represents a milestone in EU activity against financial crimes, the EU’s budget, and is responsible for investigating, prosecuting, and bringing to judgment—where appropriate in liaison with Europol—the perpetrators of and accomplices in offenses against the Union’s financial interests, as determined by the regulation provided for in Article 86 TFEU. Moreover, in the general context of the need for an EPPO in the EU, it is interesting to note that while financial market regulation relies on a range of tools, anti-fraud rules remain imperative.<sup>28</sup> Thus, in the EU context, the fight against fraud and related activities always sparks a complex debate as to the competences of the EU.

In the policy area of the AFSJ, Article 83 TFEU provides far-reaching powers in criminal law concerning cross-border criminality. But “mainstream” internal market powers—such as Article 114 TFEU—are still crucially important in the context of the EU’s fight against financial crimes. These powers are particularly significant with respect to the effect on the national arena, as Article 114 TFEU also allows for the adoption of regulations, thereby directly affecting citizens and Member State legislation. Consequently, the EPPO is also interesting as regards to the relationship between the internal market and the AFSJ, as financial crimes are relevant to both of these policy areas. In short, most arguments against the establishment of an EPPO concern the inaccuracy of the figures presented by the Commission, as well as the lack of added value from EPPO investigations.<sup>29</sup> It was also argued that its establishment possibly had a detrimental impact on the existing actors in the area and their future cooperation with non-EPPO Member States. It is difficult to separate rules relating to investigations and prosecutions, at the EU level, and trials at Member State level.

As noted above, the EU has, for a long time, had preferences for relying on the slogan “confidence in the market” as an all-embracing justification for approximation under Article 114 TFEU and where criminal law has been used as a tool for boosting such confidence.<sup>30</sup> The often over-reliance on confidence as a justification for harmonization has long been observed—and criticized—in the context of private law and more lately spilled over into the

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<sup>27</sup> E.g., Madalina Busuioc, Deirdre Curtin, & Martijn Groenleer, *Agency Growth Between Autonomy and Accountability: the European Police Office as a “living institution,”* 18 J. EUR. PUB. POL’Y 848 (2011); See also, P Schammo, *The European Union Securities and Market Authority: Lifting the veil on the Allocation of Powers*, 49 COMMON MKT. L. REV. 1879, 1887 (2011).

<sup>28</sup> See e.g., NIAMH MOLONEY, *EU SECURITIES AND FINANCIAL MARKETS REGULATION* (2014).

<sup>29</sup> See e.g., Aandras Csúri, *The Proposed European Public Prosecutor’s Office—from a Trojan Horse to a White Elephant?*, 18 CAMBRIDGE Y.B. OF EUR. LEGAL STUD., 122 (2016); Irene Wieczorek, *The EPPO Draft Regulation Passes the First Subsidiarity Test: An Analysis and Interpretation of the European Commission’s Hasty Approach to National Parliaments’ Subsidiarity Arguments*, 16 GERMAN L.J. 1247, 1248 (2016).

<sup>30</sup> See e.g., Directive 2015/849, *supra* note 21.

field of EU criminal law.<sup>31</sup> Hence, in short, there is a reason why the question of the fight against financial crimes—and financing of terrorism—has become a key issue for the EU legislator. Thus, a majority of the current instruments adopted by the EU in the area of the suppression against financial crimes have been enacted on the basis and justification that there is still a need for increased regulatory response to financial crises that started in 2008 and to the current security threat of terrorism confirming the overlap between market oriented approaches and that of security.<sup>32</sup> Indeed the recently adopted Directive<sup>33</sup> to counter terrorism in the EU highlights the strong market elements to the fight against the financing of terrorism. In its preamble—recital 13—it is stated that:

Illicit trade in firearms, oil, drugs, cigarettes, counterfeit goods and cultural objects, as well as trafficking in human beings, racketeering and extortion have become lucrative ways for terrorist groups to obtain funding . . . increasing links between organized crime and terrorist groups constitute a growing security threat to the Union and should therefore be taken into account by the authorities of the Member States involved in criminal proceedings.

After having outlined the wider picture of the current EU approach to countering financial crimes and its strong security dimension, this Article will now turn to the EPPO in further detail.

### **C. The European Public Prosecutor Office**

#### *I. Background*

The establishment of an EPPO has been met with serious opposition. Eleven national parliaments voted against the proposal in the yellow card procedure. Based on this vote, one would have thought that the enhanced cooperation mechanism would have been triggered earlier. Instead, the Commission maintained its proposal essentially intact, notwithstanding the fact that the yellow card procedure has been used for the only second

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<sup>31</sup> *E.g.*, Stephen Weatherill, *The Limits of Legislative Harmonization Ten Years after Tobacco Advertising*, 12 GERMAN L.J. 827 (2011).

<sup>32</sup> *See e.g.*, LUCIA QUAGLIA, *THE EU AND GLOBAL SECURITIES MARKETS REGULATION* (2014); *See also*, Ryder and Bergstrom in this special issue.

<sup>33</sup> Directive 2017/541 of the European Parliament and of the Council of 15 March 2017 on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, 2017 O.J. (L 88) 6-21.

time since its inclusion in the Treaties.<sup>34</sup> Specifically, the EPPO has, with regards to the original draft, triggered reasoned opinions—or so called yellow cards—issued by fourteen chambers of eleven different national parliaments.<sup>35</sup> This attracted a lot of attention and debate in academia and legal practice.<sup>36</sup> The only possibility for the EPPO project to survive was eventually through the invocation of the enhanced cooperation mechanism, according to which some Member States—nine or more—could pursue flexible integration. This could, of course, be considered as a subsidiarity-friendly alternative as it allows for differentiation within the EU and thereby for national divergence between the Member States. So, the classic notion of enhanced cooperation means that some Member States go further than other States. The concept accepts that there is room for action outside the EU model and that not all Member States have to be in the same boat, while still respecting each other through the fundamental loyalty principle of Article 4.3 TEU. From the perspective of the establishment of an EPPO—through the notion of flexible integration—it also raises concerns about a system that seems to offer a half-baked solution. After all, it may be asked what the function of an EPPO is if the whole EU does not join.

When discussing the use of enhanced cooperation in the EPPO context, it is essential to understand the general climate in which this type of alternative integration takes place. Indeed, Member States—like the UK and Denmark—already enjoy a major opt-out arrangement from the AFSJ. Accordingly, with the UK leaving through its Brexit negotiations, only Denmark has an “out” of the mayor AFSJ scheme.<sup>37</sup> Moreover, other Member States—like Sweden and the Netherlands—announced early that they would not participate due to what they consider the far-reaching competences of the EPPO, including the possibility of extending the competences of the EPPO to criminality not related to the EU budget. Indeed, Article 86(4) provides for the possibility of a future European Council to adopt a decision amending the competences of such a prosecutor to include serious crime with a cross-border dimension in a broader sense, we will return to this below. More recently, the

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<sup>34</sup> *Id.*

<sup>35</sup> Treaty of Lisbon, *supra* note 3.

<sup>36</sup> *E.g.*, Gerard Conway, *The Future of a European Public Prosecutor in the Area of Freedom, Security and Justice, in THE EUROPEAN UNION AS AN AREA OF FREEDOM, SECURITY AND JUSTICE* (Maria Fletcher et al. eds., 2016); Jacob Öberg, *Limits to EU Powers: A Case Study of EU Regulatory Criminal Law* ch. 7 (2017); *The Establishment of a European Public Prosecutor's Office: Between "Better Regulation" and Subsidiarity Concerns, in THE ESTABLISHMENT OF THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE (EPPO): "STATE OF PLAY AND PERSPECTIVE"* (Willem Geelhoed et al. eds., 2018); *TOWARD A PROSECUTOR FOR THE EUROPEAN UNION* (Katlin Ligeti ed., 2012); Dianne Fromage, *The Second Yellow Card on the EPPO Proposal: An Encouraging Development for Member State Parliaments?*, 35 *Y.B. OF EUR. L.* 5 (2016).

<sup>37</sup> See Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) protocol 22.

Netherlands changed its mind and has decided to participate in the establishment of the EPPO.<sup>38</sup>

As mentioned, the idea of an EPPO is, however, not new. It had first publicly been developed by the so-called *Corpus Juris* group of academics and practitioners in the 1990s in response to a request by the Commission, with a model proposal in 1997 and which was revised in 2000.<sup>39</sup> This *Corpus Juris* formed the basis for a *Commission Green Paper*,<sup>40</sup> which eventually led to Article 86 TFEU. Yet the question of enforcement of EU anti-fraud policies seems to have been largely left to the EU Court of Justice through its case law. According to the well-established case law starting with the *Greek Maize* case,<sup>41</sup> Member States have to protect EU interest the same way as it protects national interests. Specifically, this case concerned fraud against the EU where the Court held that: “. . . the Member States must ensure that infringements of EU law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.”<sup>42</sup>

The main argument in favor of establishing the EPPO—as presented by the Commission—is that Eurojust and Europol have a general mandate to facilitate the exchange of information and coordinate national criminal investigations and prosecutions but lack the power to carry out acts of investigation or prosecution themselves. According to the Commission, action by national judicial authorities often remains slow, prosecution rates on the average are low, and results obtained in the different Member States over the Union as a whole are unequal. Based on this track record, the judicial action undertaken by Member States against fraud may currently not be considered as effective, equivalent, and deterrent as required under the Treaty. Yet, there is a fundamental flaw in the creation of a European Public Prosecutor: It is difficult to separate rules relating to investigations and prosecutions, at the EU level, and trials at Member State level.

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<sup>38</sup> As to Sweden’s position on not joining the EPPO see Council 2017, EPPO General Approach, point no. 11. On the Dutch position see, Etienne Verschuren, *Nederland doet toch niet mee aan Europees OM*, NRC (Nov. 24, 2016), <https://www.nrc.nl/nieuws/2016/11/23/nederlanddoet-toch-niet-mee-aan-europees-openbaar-ministerie-a1533218>; see also, Sofie Wolf, *The Netherlands will join the European Public Prosecutor’s Office*, MAASTRICHT UNIVERSITY (May 17, 2018), <https://www.maastrichtuniversity.nl/blog/2018/05/netherlands-will-join-european-public-prosecutors-office-eppo>.

<sup>39</sup> See Delmas-Marty, *supra* note 2.

<sup>40</sup> See *Green Paper on Criminal Law Protection of the Financial Interests of the Community and the Establishment of a European Prosecutor*, COM (2001) 715 final (Dec. 11, 2001).

<sup>41</sup> See Case C-68/88, *Comm’n v. Greece*, 1989 E.C.R. I-2965, §24.

<sup>42</sup> See Ester Herlin Karnell & Nic Ryder, *The Robustness of EU Financial Crimes Legislation: A Critical Review of the EU and UK Anti-Fraud and Money Laundering Scheme*, 27 EUR. BUS. L. REV. 427, 427 (2017).

## II. Main Features

The EPPO is a centralized decision-making EU institution with a de-centralized enforcement structure that investigates, prosecutes, and brings to judgment offenses against the EU financial interests. Specifically foreseen in Article 86 of the TFEU, its final establishment created a heated discussion among EU institutions and Member States and triggered the enhanced cooperation clause.<sup>43</sup> In plain language: The EPPO is a controversial EU institution that raises sovereignty concerns among Member States. For the purposes of this Article it pays to separate the previous statement in three basic concepts: (i) The centralized decision-making institution; (ii) the de-centralized enforcement structure; and (iii) its jurisdiction over crimes against EU financial interests.

The need for an EU enforcement institution with centralized decision-making authority in this area has been acknowledged from its inception. The sheer fact proclaimed repeatedly by the OLAF in terms of “under-enforcement” in this area has justified the need to establish an EU Institution that would ensure adequate enforcement of EU legislation to protect the financial interests of the EU.<sup>44</sup> Given that pursuant to the authority conferred to Eurojust in Article 85 TFEU would not solve “the current disparities and fragmentation of national prosecution efforts,”<sup>45</sup> the only feasible proposal was the creation of the EPPO from Eurojust.

The centralized decision-making authority in the EPPO regulation consists of—as is stated in article 8—the “European Chief Prosecutor, who is the head of the EPPO as a whole and the

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<sup>43</sup> The Member States that communicated its desire to establish this institution were: Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Germany, Finland, France, Greece, Lithuania, Luxembourg, Portugal, Romania, Slovakia, Slovenia, and Spain. In May 2018, the Netherlands notified the Commission of its intention to join. See, European Public Prosecutor’s Office, EUROPEAN COMMISSION EUROPEAN ANTI-FRAUD OFFICE, [https://ec.europa.eu/anti-fraud/policy/european\\_public\\_prosecutor\\_en](https://ec.europa.eu/anti-fraud/policy/european_public_prosecutor_en).

<sup>44</sup> *Commission Staff Working Document Executive Summary of the Impact Assessment Accompanying the document Proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office*, at 11, SWD (2013) 274 final (July 17, 2013) [hereinafter Impact Assessment]:

Every year at least several hundred million euros are fraudulently diverted from their intended purpose. Only a small fraction of these losses are ever recovered from the criminals. These figures show that the financial interests of the European Union are insufficiently protected from fraud. In fact, the Commission’s annual statistics (including those of OLAF) demonstrate that while fraud against the Union’s financial interests is pervasive and causes substantial damage every year to the tax payer, national criminal enforcement efforts lag behind. In particular, OLAF’s cases which are transferred to national investigation and judicial authorities are not always equally effectively followed-up.

<sup>45</sup> *Id.* at 14.

head of the College of European Prosecutors, Permanent Chambers and European Prosecutors.” A savvy reader will quickly notice that the existence of such a variety of individuals and bodies raises some concerns as to the real centralization of the decision-making authority. This is not by chance. It is the result of a complicated negotiation process that took place once the EU Commission laid out its first proposal for the EPPO Regulation.<sup>46</sup>

In the EU Commission’s previous Proposal for the EPPO there was no “College of European Prosecutors,” nor “Permanent Chambers.”<sup>47</sup> Nevertheless, there was a clear objection by Member States to such degree of centralization and supranational authority.<sup>48</sup> The resulting centralized structure functions the following way:

1. The College makes decisions on strategic matters.<sup>49</sup>
2. The Permanent Chambers monitors and direct investigations and ensures the coherence of the activities of the EPPO.<sup>50</sup>

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<sup>46</sup> See *Proposal for a Council Regulation on the Establishment of the European Public Prosecutor's Office* Brussels, COM (2013) 534 final (July 17, 2013) [hereinafter EPPO Regulation].

<sup>47</sup> See THE EUROPEAN PUBLIC PROSECUTOR’S OFFICE: AN EXTENDED ARM OR A TWO-HEADED DRAGON? (Marta Pawlik et al. eds., 2015).

<sup>48</sup> See Anne Weyembergh & Chloé Briere, *Towards a European Public Prosecutor, Policy paper for the European Parliament* (2016) (available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571399/IPOL\\_STU\(2016\)571399\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571399/IPOL_STU(2016)571399_EN.pdf)):

The idea of an entirely supranational prosecution service organised at central level and composed of a chief prosecutor and several specialized deputy prosecutors acting throughout MSs’ territories was quickly abandoned. Decentralisation was the preferred option, and discussions focused on defining the most appropriate level. Negotiations have evolved towards ever less centralisation and more decentralisation, from a small hierarchical central office towards a collegial body with various layers. This development raises the question as to whether a sufficient degree of Europeanisation / verticalisation remains, or whether MSs have expanded their control over the EPPO to the extent that it has been deprived of any added value.

<sup>49</sup> Including determining the priorities and the investigation and prosecution policy of the EPPO, as well as on general issues arising from individual cases—for example regarding the application of this Regulation—the correct implementation of the investigation and prosecution policy of the EPPO or questions of principle or of significant importance for the development of a coherent investigation and prosecution policy of the EPPO. The decisions of the College on general issues should not affect the duty to investigate and prosecute in accordance with this Regulation and national law. The College should use its best efforts to take decisions by consensus. If such a consensus cannot be reached, decisions should be taken by voting. See EPPO Regulation, *supra* note 46, at 24.

<sup>50</sup> The composition of Permanent Chambers should be determined in accordance with the internal rules of procedure of the EPPO, which should allow—among other things—for a European Prosecutor to be a member of more than one Permanent Chamber where this is appropriate to ensure, to the extent possible, an even workload between individual European Prosecutors. See *id.* at 25.

3. The European Prosecutors supervise, on behalf of the competent Permanent Chamber, the investigations and prosecutions handled by the European Delegated Prosecutors in their Member State of origin.<sup>51</sup>

The de-centralized enforcement structure is carried out by the European Delegated Prosecutors in each Member State. Under the instructions of the Permanent Chamber and under the supervision of a European Prosecutor appointed to that Chamber, the European Delegated Prosecutors are entrusted with the task of doing the “ground work.”<sup>52</sup> It is here that the famous concept of the “double-hat” prosecutors plays a major role. Although members of the national prosecutorial authorities—and therefore bound by their loyalty to the respective national authorities—these “double-hat” prosecutors are also a part of the EPPO<sup>53</sup> that must comply with the instructions of the Permanent Chamber when handling cases related to the protection of the EU financial interests.<sup>54</sup>

The benefits of these centralized and decentralized structures are manifold. First, from a sovereignty perspective, the actual authorities conducting law enforcement activities and appearing before national courts are national law enforcement authorities—not supranational authorities. The fact that they are being instructed by somewhat supranational authorities and supervised by a European Prosecutor of their own country of origin<sup>55</sup>, does not alter the fact that the European Delegated Prosecutors are members of the prosecutorial and judicial national authorities.<sup>56</sup> Second, from a policy perspective, the

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<sup>51</sup> A European Prosecutor from each Member State should be appointed to the College. They should act as liaison between the central office and the decentralized level in their Member States, facilitating the functioning of the EPPO as a single office. The supervising European Prosecutor should also check any instruction’s compliance with national law and inform the Permanent Chamber if the instructions do not do so. *See id.*

<sup>52</sup> The investigations of the EPPO should—as a rule—be carried out by European Delegated Prosecutors in the Member States. They should do so in accordance with this Regulation and, as regards matters not covered by this Regulation, in accordance with national law. European Delegated Prosecutors should carry out their tasks under the supervision of the supervising European Prosecutor and under the direction and instruction of the competent Permanent Chamber

<sup>53</sup> The European Delegated Prosecutors should be an integral part of the EPPO and as such, when investigating and prosecuting offenses within the competence of the EPPO, they should act exclusively on behalf and in the name of the EPPO on the territory of their respective Member State.

<sup>54</sup> The European Delegated Prosecutors should be bound to follow instructions coming from the Permanent Chambers and the European Prosecutors

<sup>55</sup> It must bear in mind that a European Prosecutor from each Member State is appointed to the College. Also, nothing precludes a European Prosecutor of the country of origin where the enforcement action is conducted to be a member of the Permanent Chamber instructing the European Delegated Prosecutors in charge of the investigation in that Member State.

<sup>56</sup> This is a well-established requirement of the EPPO Regulation: European Delegated Prosecutors should, during their term of office, also be members of the prosecution service of their Member State, namely a prosecutor or member of the judiciary, and should be granted by their Member State at least the same powers as national

Member States are able to channel their concerns regarding the enforcement actions of the EPPO at various stages of the centralized level: In the College—through their designated European Prosecutor—and in the supervising European Prosecutor of the actual case. There are certain safeguards to prevent national authorities from directly influencing the outcome of the enforcement action, but these are more theoretical than practical. Third, from a procedural perspective, the European Delegated Prosecutors are knowledgeable of the national procedural requirements for a case to proceed and given that the EPPO does not provide a comprehensive body of rules of procedure, it is necessary to resort to national procedural law in many instances. Fourth, from an economic perspective, the use of already existing national prosecutors with a “double-hat” function certainly diminishes the economic impact that would cause creating a whole new body of EU prosecutors acting in each Member States.<sup>57</sup>

From a practical national perspective, there are no major changes caused by the installations by the EPPO. The same national body of prosecutors that has been investigating and prosecuting these cases in the past will be exercising the same powers in the future. The only significant difference is that they will be receiving instructions from an EU body, but supervised by a European prosecutor of their own country. To be sure, the fact that these European Delegated Prosecutors are now also a part of an EU body certainly makes a difference from an institutional perspective. But this does not alter the fact that—from a national perspective—the same prosecutors will be prosecuting the same offenses.<sup>58</sup>

### *III. Jurisdiction and Competence*

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prosecutors.

<sup>57</sup> Impact Assessment, *supra* note 44:

The costs of the different options for establishing the EPPO vary quite considerably. The most expensive option is the centralised one, which assumes that all investigations and prosecutions will be handled at the European level, leading to a higher number of required EU staff. The decentralised option does not entail as much costs, also because use is made to a large extent of resources existing in the Member States, at Eurojust and at OLAF. The costs for the centralised option over twenty years are expected to be over €800 million, whereas the costs for the decentralised option are expected to be about €375 million. These costs include all costs expected to arise from establishing a new European body.

<sup>58</sup> Fabio Guiffreda produced a useful chart depicting the basic structure of the EPPO. It clearly shows the horizontal rather than vertical approach of the EPPO and the importance of the national prosecutors in the overall functioning. See Fabio Guiffreda, *The European Public Prosecutor's Office: King Without Kingdom?*, CEPS Research Report No. 2017/03, (Feb. 2017), [http://aei.pitt.edu/84218/1/RR2017%2D03\\_EPPO.pdf](http://aei.pitt.edu/84218/1/RR2017%2D03_EPPO.pdf).

Currently, the EPPO only has competence regarding the protection of the EU financial interests. As noted previously, the EU institutions and European academics have been dealing with the possibility of establishing an EPPO for decades. A constant factor in the myriad of contributions related to the EPPO has been its intrinsic connection to the overall discussion of how to protect the EU financial interests. In this sense, since the first version of the *Corpus Juris* for the Protection the EU financial interests in 1997, the convenience of establishing a European Public Prosecutors Office to secure the protection of the EU financial interest has been a silent consensus. Therefore, when the Lisbon Treaty introduced specific provisions related to the EPPO, it came to no surprise that, out of the immense catalog of crimes that have been harmonized at a European level, only the protection of the EU financial interests was specifically referred. As is clear from article 86 TFEU:

1. In order to combat crimes affecting the **financial interests of the Union**, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust.
2. The European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, **offenses against the Union's financial interests**, as determined by the regulation provided for in paragraph 1. It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offenses.

The term “offenses against the Union’s financial interests” stated in the TFEU seems to indicate a quite limited jurisdiction of the EPPO. Nevertheless, the final scope is more far reaching as the tasks of the EPPO are to investigate, prosecute, and bring to judgment the perpetrators of offenses against the Union’s financial interests under Directive (EU) 2017/1371 of the European Parliament and of the Council and offenses which are

inextricably linked to them.<sup>59</sup> Among these offenses are passive and active corruption,<sup>60</sup> misappropriation of public funds,<sup>61</sup> and damaging the Union's financial interests.

It should be noted from the outset, that the fact that the EPPO will be prosecuting active and passive corruption—for example, prosecuting local and national public officials—will surely create certain controversy with local and national authorities from time to time. This, however, is a common thread in supranational prosecuting authorities.

Also, it should be observed that traditional VAT fraud cases are also included in the Directive.<sup>62</sup> The consequences of such inclusion are not to be taken lightly. It means that as soon as the EPPO starts to function, the caseload of the delegated European Prosecutors will be quite significant. In this sense, it is true that the number of cases addressing procurement and non-procurement expenditure has been quite low in a number of Member States. Yet, the number of VAT fraud cases currently enforced in certain jurisdiction is quite staggering.

#### *IV. Extending the Jurisdiction of the EPPO to EU Financial Crimes?*

The EPPO currently has the competence to prosecute offenses against the EU financial interests. Yet, it is fair to say that the drafters of the TFEU probably had in mind a broader expansion of EPPO's jurisdiction to include other offenses. Article 86.4 TFEU specifically enables the European Council—by way of a unanimous decision—to extend the powers of

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<sup>59</sup> See Directive 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the Fight Against Fraud to the Union's Financial Interests by Means of Criminal Law, 2017 O.J. (L 198) 29.

<sup>60</sup> "Passive corruption" means the action of a public official who—directly or through an intermediary—requests or receives advantages of any kind, for himself or for a third party, or accepts a promise of such an advantage, to act or to refrain from acting in accordance with his duty or in the exercise of his functions in a way which damages or is likely to damage the Union's financial interests. "Active corruption" means the action of a person who promises, offers or gives, directly or through an intermediary, an advantage of any kind to a public official for himself or for a third party for him to act or to refrain from acting in accordance with his duty or in the exercise of his functions in a way which damages or is likely to damage the Union's financial interests. See *id.* at art. 4.

<sup>61</sup> "Misappropriation" means the action of a public official who is directly—or indirectly—entrusted with the management of funds or assets to commit or disburse funds or appropriate or use assets contrary to the purpose for which they were intended in any way which damages the Union's financial interests.

<sup>62</sup> See Directive 2017/1371, *supra* note 59, at art. 3. In respect of revenue arising from VAT own resources, any act or omission committed in cross-border fraudulent schemes in relation to:

- (i) The use or presentation of false, incorrect or incomplete VAT-related statements or documents, which has as an effect the diminution of the resources of the Union budget;
- (ii) non-disclosure of VAT-related information in violation of a specific obligation, with the same effect; or
- (iii) the presentation of correct VAT-related statements for the purposes of fraudulently disguising the non-payment or wrongful creation of rights to VAT refunds.

EPPO to include serious cross-border criminality.<sup>63</sup> The question is: Which EU financial crimes should be subject to EPPO enforcement?

A reasonable approach to this issue is to determine which type of financial crimes—in a broad sense—has already been subject to EU harmonization pursuant to the clause included in Article 83.1 TFEU. Out of the wording of this legal provision, the following areas stand out: Money laundering, corruption, and counterfeiting of means of payment. As we shall see, these areas are traditionally enforced by federal institutions in other countries—most notably by American Federal Prosecutors.

Approaching this expansion solely from an Article 83.1 TFEU perspective could prove to be short sided. In this sense, a reasonable interpretation could also include those cases which are included in the criminal harmonization movement pursuant to Article 83.2 TFEU. For example, ensuring an effective implementation of a Union policy, that—being serious enough—affects more than one Member State.

The specific instance that comes to mind is the above mentioned EU Market Abuse. Since July 3<sup>rd</sup>, 2016, the Directive 57/2014 establishing criminal sanctions for Market Abuse entered into force. The Directive establishes the elements of the crimes of market manipulation and insider trading. When such misconduct affects more than one Member State it would seem reasonable that the EPPO could have jurisdiction. This holds especially true when EU Supervisory Agencies are already exerting EU power over this area. To this extend, the European Securities and Markets Authority—ESMA—has initiated various enforcement actions since its inception<sup>64</sup> and, actually, the hotly contested enforcement powers was a key issue over which the Court of Justice of the European Union—CJEU—had to rule on in Case C-270/12, *UK v. Council of the European Union and European Parliament*.<sup>65</sup>

In this area it should also be noted that the recent—and to some extent, revolutionary—case law of the CJEU regarding the *ne bis in idem* principle, supports the importance of

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<sup>63</sup> The European Council may—at the same time or subsequently—adopt a decision amending paragraph one in order to extend the powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension and amending accordingly paragraph two as regards the perpetrators of, and accomplices in, serious crimes affecting more than one Member State. The European Council shall act unanimously after obtaining the consent of the European Parliament and after consulting the Commission.

<sup>64</sup> See *Enforcement Actions*, EUROPEAN SECURITIES AND MARKETS AUTHORITY, <https://www.esma.europa.eu/supervision/enforcement/enforcement-actions>

<sup>65</sup> See Case C-270/12, *United Kingdom of Great Britain and Northern Ireland v. European Parliament and Council of the European Union*, 2014 I.C.J. 562 (Sept. 12).

market abuse in the context of the EU. In this sense, both in *Garlsson*<sup>66</sup> and *Di Puma*,<sup>67</sup> the CJEU stresses the importance of protecting both the integrity of the financial markets of the EU and public confidence in financial instruments. To achieve these objectives, combating infringements of the prohibition on market manipulation and duplicating criminal and administrative proceedings, penalties may be justified. Therefore, an extension of the EPPO's jurisdiction in this area would be consistent with the importance that the CJEU weighs in on combating market manipulation.

Moreover, it cannot be ruled out that there be a potential extension of the EPPO's powers to areas related to banking supervision and the resolution of credit institutions. For example, contexts in which the existence of EU Agencies has to be kept in mind. This, again, holds especially true when in some instances EU legislation is already imposing the obligation on EU Institutions to ensure that individuals and companies are held criminally accountable, and Member States are obliged to impose "effective, proportionate and dissuasive" sanctions for not complying with the obligations of EU legislation.<sup>68</sup> In this sense—in the context of the resolution of credit institutions by the Single Resolution Mechanism—Regulation 806/2014<sup>69</sup> establishes as a general principle a governing resolution—Article 15—that the Board, the Council, and the Commission ensure that natural and legal persons are made liable, subject to national law, under civil or criminal law, for their responsibility for the failure of the institution under resolution.

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<sup>66</sup> See Case C-537/16, *Garlsson Real Estate and Others v. Commissione Nazionale per le Società e la Borsa (CONSOB)*, 2018 I.C.J. 193 (Mar. 20).

<sup>67</sup> See Joined Cases 596 & 597/16, *Enzo Di Puma v. Commissione Nazionale per le Società e la Borsa (CONSOB) and Commissione Nazionale per le Società e la Borsa (CONSOB)*, v. Antonio Zecca, 2018 I.C.J. 192 (Mar. 20).

<sup>68</sup> Directive 2014/59, of the European Parliament and of the Council of 15 May 2014, Establishing a Framework for the Recovery and Resolution of Credit Institutions and Investment Firms, art. 110, 2014 O.J. (L 173) 190-348.

Without prejudice to the right of Member States to provide for and impose criminal penalties, Member States shall lay down rules on administrative penalties and other administrative measures applicable where the national provisions transposing this Directive have not been complied with, and shall take all measures necessary to ensure that they are implemented. Where Member States decide not to lay down rules for administrative penalties for infringements which are subject to national criminal law they shall communicate to the Commission the relevant criminal law provisions. The administrative penalties and other administrative measures shall be effective, proportionate and dissuasive.

<sup>69</sup> See Regulation 806/2014 of the European Parliament and of the Council of 15 July 2014, establishing Uniform Rules and a Uniform Procedure for the Resolution of Credit Institutions and Certain Investment Firms in the Framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation 1093/2010, 2014 O.J. (L 225) 1-90; Directive 2014/59, of the European Parliament and of the Council of 15 May 2014, Establishing a Framework for the Recovery and Resolution of Credit Institutions and Investment Firms, art. 34, 2014 O.J. (L 173) 190-348.

As the current wording shows, for now it seems enough for those EU Institutions to make a referral to the national authorities in order to ensure that the individuals and companies face criminal charges—if necessary—for the failure of the credit institution. Yet, it cannot be ruled out that—as a future development of the EPPO powers—in the near future those powers are extended to cases in which the failure of the credit institution affects more than one Member State, when the credit institution is subject to the Single Resolution Mechanism.

As a summary, there are three potential avenues for expanding EPPO powers: (a) Those areas already subject to EU criminal harmonization on the basis of serious cross-border criminality—contained in Article 83.1 TFEU; (b) those cases subject to EU criminal harmonization on the basis of a need to implement a EU policy, that additionally affect more than one Member State; and (c) those cases not subject to EU criminal harmonization, but that are governed by EU law and affect more than one Member State. Yet how does a possible extended jurisdiction of the EPPO correspond with the EU idea of subsidiarity and better regulation?<sup>70</sup> And what does it tell us about the EU's legislation against fraud against the EU's budget in general?

#### *V. The Fraud Directive and the Better Regulation Agenda and Links to the EPPO Project*

The discussion above should also be seen in the general context of the EU combat against financial crimes beyond the EU's budget. For example, an additional development in the EU's anti-fraud strategy and related to the establishment of an EPPO more generally, is the recent Directive on the fight against fraud to the Union's financial interests by means of criminal law.<sup>71</sup> The Directive is based on Article 325 TFEU and the fight against fraud against the EU's budget—at first instance this appears to be a significant development in the evolution of the EU's counter fraud strategy. Yet similarly to the EPPO, the scope of the proposed Directive is limited to fraud committed against the financial interests of the EU. The Directive claims that the anti-fraud framework of Article 325 TFEU is complemented by general Union criminal law measures for the fight against certain illegal activities particularly harmful to the licit economy, such as money laundering and corruption—although not specific to the protection of the Union's financial interests they also contribute to their protection.<sup>72</sup>

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<sup>70</sup> For studies of subsidiarity and EU criminal law, see e.g., JACOB ÖBERG, LIMITS TO EU POWERS: A CASE STUDY OF EU REGULATORY CRIMINAL LAW ch. 7 (2017); SAMALI METTINEN, EU CRIMINAL LAW (2013); Ester Herlin-Karnell, *Subsidiarity in the Area of EU Justice and Home Affairs—A Lost Cause*, 15 EUR. L. J. 351 (2009).

<sup>71</sup> See Directive (EU) 2017/1371, *supra* note 59, at 29–41.

<sup>72</sup> See *Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law*, COM (2012) 363 final (July 11, 2012); See Council Regulation 2988/95, of 18 December 1995 on the protection of the European Communities financial, 1995 O.J. (L 312) (setting out administrative rules for dealing with illegal activities at the expense of the Union's financial interests).

A key question is whether the EU antifraud system needs to be complemented by the additional establishment of the EPPO. Moreover, one could for instance ask if the EPPO represents “better regulation.” In the 2016 Better Regulation Agenda entitled “Better Regulation: Delivering better results for a stronger Union,” the Commission pointed out that alternative approaches will be explored where regulatory costs are found to be disproportionate to help achieve the intended goals.<sup>73</sup> In the Better Regulation Agenda of 2017, the EU promises that it will remain big on big things, and respect subsidiarity and proportionality when not.<sup>74</sup> The EU claims that by safeguarding the principles of better regulation, this will ensure that measures are evidence-based, well designed, and deliver tangible and sustainable benefits for citizens, businesses, and society as a whole. Hence, it could be asked if the EPPO really complies with the idea of “better regulation.”<sup>75</sup> Article 5 of the EPPO Regulation says that when a matter is governed by a Regulation and national law than the latter shall prevail. The Regulation also states that only procedural matters can be challenged. Of course, the Regulation also assures us again that it complies with fundamental rights—for example the EU Directive on Access to Lawyer.<sup>76</sup> Limiting it to procedural questions might be difficult in practice, and yet, it might be in line with subsidiarity, at least on paper. Still, the EPPO has clearly far-reaching implications for the legal systems of the Member States, in what is generally acknowledged to be the sovereignty-sensitive area of criminal law and procedure. Thus, an EPPO would use standard national methods of investigation and prosecution procedures. Yet a uniform treatment of crime is one of the main reasons given for the adoption of the EPPO in the first place.

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<sup>73</sup> See *Communication from the Commission to the European Parliament, the European Council and the Council: Better Regulation: Delivering better results for a stronger Union*, COM (2016) 615 final (Sept. 14, 2016).

<sup>74</sup> See *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, COM (2017) 651 final (Oct. 24, 2017).

<sup>75</sup> See also, the discussion in Ester Herlin-Karnell, *The Establishment of a European Public Prosecutor’s Office: Between ‘Better Regulation’ and Subsidiarity Concerns*, in *THE ESTABLISHMENT OF THE EUROPEAN PUBLIC PROSECUTOR’S OFFICE (EPPO): “STATE OF PLAY AND PERSPECTIVE”* (Willem Geelhoed et al. eds., 2018).

<sup>76</sup> See Directive 2013/48, of the European Parliament and of the Council of 22 October 2013 on the Right of Access to a Lawyer in Criminal Proceedings and in European Arrest Warrant Proceedings, and on the Right to Have a Third Party Informed Upon Deprivation of Liberty and to Communicate with Third Persons and with Consular Authorities While Deprived of Liberty 2013/48/EU, 2013 O.J. (L 294) 1, 1-12.

*VI. Profiling and Data Protection: A Glimpse*

It is obvious that the EPPO Regulation touches upon delicate questions on data protection.<sup>77</sup> Data protection is a fundamental EU right as it is stated in Article 7-8 Charter of Fundamental Rights, Article 16 TFEU, and Article 8 European Convention on Human Rights.<sup>78</sup>

For this reason, Article 52 in the EPPO Regulation is interesting here. The provision makes it clear that if it emerges that incorrect operational personal data has been transmitted, or operational personal data has been unlawfully transmitted, the recipient shall be notified without delay. In such a case, the operational personal data shall be rectified, erased, or processing shall be restricted in accordance with Article 61 stating that, *inter alia*, the data subject shall have the right to obtain from the EPPO without undue delay the rectification of inaccurate operational personal data relating to him or her.

Also, Article 56 of the EPPO Regulation is interesting in this respect concerning “automated individual decision-making, including profiling.” It stated that:

The data subject shall have the right not to be subject to a decision of the EPPO based solely on automated processing, including profiling, which produces legal effects concerning him/her or similarly significantly affects him/her. As a general rule, the controller shall provide the information in the same form as the request.<sup>79</sup>

Of central importance to the processing of data is also who is to be counted as a processor. Article 65 of the Regulation sets out to regulate the notion of processing. Specifically, it stipulates that:

Where processing is to be carried out on behalf of the EPPO, the EPPO shall use only processors providing sufficient guarantees to implement appropriate

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<sup>77</sup> See Directive 2016/680, of the European Parliament and of the Council of 27 April 2016, on the Protection of Natural Persons with Regard to the Processing of Personal Data by Competent Authorities for the Purposes of the Prevention, Investigation, Detection or Prosecution of Criminal Offenses or the Execution of Criminal Penalties, and on the Free Movement of such Data, and Repealing Council Framework Decision, 2008/977/JHA, 2016 O.J. (L 119) 89-131.

<sup>78</sup> See also, discussion in Els de Busser and Anne De Hing’s article in this special issue; see, e.g., Case C-293/12, Dig. Rights Ir. v. Minister for Comm’ns, Marine and Nat. Res. & Others, 2014 I.C.J. 238 (April 8); Case C-362/14, Maximilian Schrems v. Data Protection Comm’r, 2015 I.C.J. 650 (Oct. 6, 2015).

<sup>79</sup> EPPO Regulation, *supra* note 46, at art. 56-65.

technical and organisational measures in such a manner that processing will meet the requirements of this Regulation and ensure the protection of the rights of the data subject.<sup>80</sup>

Yet the definition of what processing means remains unclear as well as who is a reliable “processor” in this context.

Needless to say, this is uncharted territory and the cooperation with Europol, and other EU key agents, regarding the processing of data and what is considered “proportionate” will have a very interesting future ahead of it. Moreover, in the Preamble—recital nr 98 of the EPPO Regulation—it is stated that that European Data Protection Supervisor should have the tasks laid down in the EPPO Regulation and should have effective powers, including investigative, corrective, and advisory powers to the EPPO which constitute the necessary means to perform those tasks. This seems welcome. In addition, the EPPO is already bound by the provision in Article 5 of the Regulation, and by EU principles in general on fundamental rights, that it must conform with proportionality and the rule of law.

Let us now turn to the other side of the Atlantic and discuss the American model of federal prosecutors and see how different that system really is from the EU.

#### **D. A Comparative Perspective: The American Federal Prosecutors**

##### *1. Background*

Although American federal criminal law is based on vertical federalism, and EU criminal law shows signs of horizontal federalism, it pays to summarily note certain key features of the American system in order to assess the different structure used by both Unions to secure the same goal.<sup>81</sup>

Federal prosecution in the US is assigned to the US Attorney’s Office. Yet, their competence goes beyond criminal law enforcement, as they are also involved in civil litigation when the US is a party. As a general statement, the 93 US Attorneys work to enforce federal laws throughout the US ensuring “that the laws be faithfully executed.”<sup>82</sup> The Judiciary Act of 1789 directs the President of the USA to appoint, in each federal district, “a meet person

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<sup>80</sup> Article 65. 1 of the EPPO Regulation.

<sup>81</sup> See CARLOS GÓMEZ-JARA DÍEZ, *FEDERAL EUROPEAN CRIMINAL LAW* (2015); Auke Willems, *Mutual Trust as a Core Principle of EU Criminal Law: Conceptualizing the Principle with a view to Facilitate Mutual Recognition in Criminal Justice Matters* (2017) (unpublished PhD thesis) (on file with Vrije Universiteit Brussel and Université Libre de Bruxelles).

<sup>82</sup> U.S. CONST. art II.

learned in the law to act as an attorney for the United States.”<sup>83</sup> According to the pertaining legislation, the function of the United States Attorney was “to prosecute in [each] district all delinquents for crimes and offenses cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned.”<sup>84</sup>

Important to note is that before the US Civil War, US Attorneys prosecuted only the cases mentioned specifically in the Constitution; namely, piracy, counterfeiting, treason, felonies committed on the high seas, or cases resulting from interference with federal justice—perjury, bribery—extortion by federal officers, thefts by employees from the United States Bank, and arson of federal vessels.<sup>85</sup> Over the years, however, their powers have expanded, as we will relate below.

Similar to the EU process, in the US the federal prosecutors were provided with the powers to prosecute cases specified in the founding text—similar to the protection of the EU financial interests as noted in Article 86 TFEU. But in the US, those powers were subsequently extended over the years; a situation that probably will also take place in the EU.

There are 93 US Attorneys with over 350 Assistant US Attorneys. In addition to their main offices, many US Attorney’s maintain smaller satellite offices throughout their districts.<sup>86</sup> US Attorneys are appointed by the President, confirmed by the Senate, and they serve terms of four years, or at the President’s discretion. While the US Attorney is a political appointee, the Assistants, by law, hold non-partisan jobs, so political affiliations or beliefs should play no role in how they are hired, fired, or promoted—but this has not always been the case.

In general, the USAO consists of two major divisions: Criminal and civil. The criminal division, which is significantly larger than the civil division in most offices, prosecutes violations of the federal criminal laws. Many criminal divisions have specialized units or sections within them. Many criminal divisions now have a national security section or unit and work with state and local governments to combat terrorist activities.

The structure of the criminal division of the US Attorney’s Office—for example, the American Federal Prosecutor’s Office— shows the vertical approach of the US system and the highly specialized sections that are integrated into a coherent body. The local prosecutors of the

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<sup>83</sup> Judiciary Act of 1789, § 35, 1 Stat. 73.

<sup>84</sup> *Id.*

<sup>85</sup> See JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: U. S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS 9 (1978).

<sup>86</sup> *Find Your United States Attorney*, DEPARTMENT OF JUSTICE, <http://www.justice.gov/usao/districts>.

various States that conform the US do not play any role.<sup>87</sup> The structure of the American Federal Prosecutor's Office and the EPPO is substantially different, especially with the introduction of the "College of European Prosecutors" and the "Permanent Chambers." Put simply, the American Federal Prosecutor's Office does not have to manage the various interests of enforcement authorities of Member States that—although guided by the same goal of protecting the Union's financial interests—might have conflicting agendas. Also, it seems reasonable that as the case load increases, there will be a need to establish various sections in the EPPO that specialize in different areas. If the expansion of the EPPO powers takes place, this will be even more necessary.

In any event, the United States Attorney retains a large degree of independence and prosecutorial discretion.<sup>88</sup> Obviously, United States Attorneys receive direction and policy advice from the Attorney General and other Department officials, but the United States Attorney has wide latitude in determining what cases are taken under consideration in his or her district. "The discretionary power to decide whether to prosecute is awesome," admitted one US Attorney.<sup>89</sup> This power is so formidable that, "if the United States Attorney abuses this power, the only available remedy is removal."<sup>90</sup>

From this perspective, the EPPO regulation seems to also provide a great deal of discretion to the European Prosecutors, and no specific regime of liability for abuse of its power—absent from the data protection provisions contained in Art. 47—seems to be foreseen.

Granting such prosecutorial discretion to the EPPO should give us pause. The experience of the US federal system in which, as noted, the AFPO's prosecutorial discretion goes largely un-reviewed,<sup>91</sup> has generated considerable criticism. The alleged gatekeeper function of prosecutors has no real enforcement mechanisms, and instead is dependent upon the

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<sup>87</sup> *Organizational Chart*, DEPARTMENT OF JUSTICE, <https://www.justice.gov/criminal/sectionoffices/chart>.

<sup>88</sup> For some classic explanations, see John Kaplan, *The Prosecutorial Discretion—a Comment*, 60 NW. U. L. REV. 174 (1965); Wayne LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532 (1970).

<sup>89</sup> *Id.* at 47.

<sup>90</sup> *Id.*

<sup>91</sup> For an introductory view from the Government side, see James Gorelick & Harry Litman, *Prosecutorial Discretion and the Federalization Debate*, 46 HASTINGS L.J. 967 (1995) (explaining why the principle that the federal courts should never, or even rarely, be able to exercise criminal jurisdiction over areas of criminal law that also fall under the concurrent jurisdiction of the state system is flawed); for a general overview, see Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2138-2142 (1998); some interesting statistics were provided by Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. (1980) at 246, 257, 278.

ethical personal integrity of the member of the US Attorney's Office.<sup>92</sup> In theory, defendants may make a claim of discrimination under the selective prosecution doctrine, arguing that a prosecutor chose to pursue their case for illegitimate reasons.<sup>93</sup> Nevertheless, this standard is purposefully high, with a presumption that even the preliminary showing to obtain discovery should "be a significant barrier."<sup>94</sup> There are mechanisms within the DOJ, which in turn have congressional supervision, that provide the necessary doses of control that make the system at least bearable for the citizenry.<sup>95</sup> This prosecutorial leeway raises important issues in a criminal justice system where many crimes fall under concurrent state and federal jurisdiction.<sup>96</sup> Combined with the already discussed proliferation of federal criminal laws in the US, individual prosecutors in the US perhaps have the most say in whether or not a crime is treated as federal or left to state mechanisms.

There has also been some debate over the political dependence of US Attorneys,<sup>97</sup> who are appointed by the federal government, but serve in decentralized offices throughout the American landscape. It is no easy task to coordinate opposing interests, as the perception of

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<sup>92</sup> Though the piece is more than 30 years old, the work of James Vorenberg, *Decent Restraints in Prosecutorial Power*, 94 HARV. L. REV. 1521, 1559 (1981) is worth revisiting. As he noted at 1554:

Prosecutors are not held to anything remotely like what due process would require if they were engaged in an acknowledged rather than a hidden system of adjudication. No uniform, pre-announced rules inform the defendant and control the decision-maker; a single official can invoke society's harshest sanctions on the basis of ad hoc personal judgments. Prosecutors can and do accord different treatment--prison for some and probation or diversion to others--on grounds that are not written down anywhere and may not have been either rational, consistent, or discoverable in advance.

<sup>93</sup> See *U.S. v. Armstrong*, 517 U.S. 456 (1996) (explaining the procedural requirements of a selective prosecution claim).

<sup>94</sup> Not surprisingly, many consider this threshold to be virtually insurmountable in many cases, leaving prosecutorial discretion effectively unreviewable. *Id.* at 463-64. See Anne Bowen Poulin, *Prosecutorial Discretion and Selective Prosecution: Enforcing Protection after United States v. Armstrong*, 34 AM. CRIM. L. REV. 1081 (1997) (referring to this defense right as "The Disfavored Right"); Yaov Sapir, *Neither Intent nor Impact: A Critique of the Racially Based Selective Prosecution Jurisprudence and a Reform Proposal*, 19 HARV. BLACKLETTER L. J. 127 (2003); Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 CHI.-KENT L. REV. 605 (1998).

<sup>95</sup> See Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757 (1999) (noting, however, that Congress cannot use many of the tools for monitoring and managing delegated criminal enforcement authority that it can draw on to constrain bureaucratic discretion in other areas).

<sup>96</sup> See Robert Heller, Commentary, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. PA. L. REV. 1309, 1309-15 (1997) (noting that "[c]oncurrent jurisdiction due to the federalization of criminal law introduces into the criminal justice system a potential for prosecutorial abuse that was not an area of concern when crime was primarily a locally regulated phenomenon").

<sup>97</sup> See Sara Sun Beale, *Rethinking the Identity and Role of US Attorneys*, 6 OHIO ST. J. CRIM. L. 369 (2009).

certain issues from D.C. might greatly differ from the more local needs that the regional offices face. Add opposing political interests to the mix and the potential for dispute grows.

This issue is very relevant to the EPPO, especially because Brussels is perceived as even more of an outsider in the EU than Washington D.C. is in the US. The US controversy between local and federal prosecutors could be reduced or avoided in the EU if criminal law were limited to “direct” or “genuine” European offenses, so that the risk of overlapping with Member States’ regulations is hence diminished. Such limitations would also reduce the power—and the problem—of federal prosecutors to invoke a different law and punishment for similar defendants at their discretion. There could still be some local hesitance to prosecute valued members of the local community, and this hesitation will be exacerbated by the fact that they will be tried in state courts applying European standards. Overall, though, the system will have a greater chance to maintain its integrity if offenses that are perceived to be only of state interest are left to the corresponding authorities of the Member States.

#### *1. Jurisdiction of the American Federal Prosecutors*

As noted before the initial powers of the American Federal Prosecutor’s Office were limited to those specific areas of criminal law foreseen in the US Constitution. Given that the EPPO foresees a potential expansion of its jurisdiction, it pays to review in which areas the jurisdiction of the American Federal Prosecutor’s Office has been expanded. The comparison will highlight the areas in which the expansion of the EPPO would be consistent with the approach undertaken by the US federal system. The current areas of AFPO enforcement are the following:

First, on public integrity, consider the following categories: (i) Identifying, investigating, and prosecuting corrupt government officials; (ii) providing expertise, guidance, and instruction to law enforcement agents and prosecutors on matters involving corruption; and (iii) ensuring that sensitive public corruption and election crime matters are handled in a uniform, consistent, and appropriate manner across of the US. As noted before, Directive 2017/1371 confers powers to the EPPO in order to prosecute active and passive corruption—when related to EU financial interests.<sup>98</sup> The American experience shows that this is as sensitive as productive area of enforcement by federal prosecutors.<sup>99</sup>

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<sup>98</sup> See Directive 2017/1371, *supra* note 59, at 72.

<sup>99</sup> See Peter J. Henning, *Federalism and the Federal Prosecution of State and Local Corruption*, 92 KENT. L.J. 1 (2003) (“[s]ince the 1970s, federal prosecutors have been particularly active in prosecuting state and local officials for corruption”). The interesting issue is that, with time, federal prosecutors have prosecuted state and local officials even if no federal funds were involved; see Peter J. Henning, *Federalism and the Federal Prosecution of State and Local Corruption*, 92 KENT. L.J. 1, 2 (2003) (“[d]o federal prosecutors invade an area traditionally reserved to the states by applying federal statutes to local corruption that does not implicate the exercise of any direct federal power or the misuse of federal funds?”). A similar trend could take place in the EU given the widespread consensus against corruption and the perceived inaction by national prosecutors in some instances.

Second, when it comes to human rights and special prosecutions concerns the following: (i) Investigating and prosecuting cases related to human rights violations; (ii) international violent crime, and complex immigration crimes; (iii) and pursuing the US Government's commitment to holding accountable human rights violators and war criminals, both as a domestic law enforcement imperative and as a contribution to the global effort to end impunity.

Third, the crime of fraud concerns the following: Investigating and prosecuting sophisticated and multi-district white-collar crimes including corporate, securities, and investment fraud, government program and procurement fraud, health care fraud, and international criminal violations including the bribery of foreign government officials in violation of the Foreign Corrupt Practices Act. As discussed above, Directive 2017/1371 gives powers to the EPPO in order to prosecute only fraud against the financial interests of the EU in terms of procurement fraud and VAT fraud. The American legislation encompasses not only such specific fraud offenses—for example fraud against the Union—but all types of fraud when they affect interstate commerce.

Fourth, the crime of child exploitation involves: (i) Prosecuting high-impact cases involving online child pornography, the online grooming and inducement of children by sexual predators, sex trafficking of children, travel abroad by US citizens and residents to sexually abuse foreign children—sex tourism—and enforcement of sex offender registration laws; (ii) providing forensic assistance to federal prosecutors and law enforcement agents in investigating and prosecuting violations of federal criminal statutes criminalizing child exploitation; (iii) coordinating nationwide operations targeting child predators; (iv) and developing policy and legislative proposals related to these issues. By contrast, the current EPPO powers do not allow this EU agency to prosecute this type of offenses. Yet, as noted previously, Article 86.4 TFEU foresees the possibility of expanding EPPO powers to serious cross-border criminality. Given that the EU has already harmonized the area of sexual exploitation of women and children on the basis of Article 83.1 TFEU, it would be reasonable to include child exploitation among the prosecutable offenses by the EPPO in cases involving a cross-border dimension. This would not only have a specific legislative basis on Article 86.4 in connection with Article 83.1 TFEU, but it would also match the current situation in the US System.

Fifth, computer crime and intellectual property crime involve: (i) Working to prevent and respond to criminal cyber-attacks; (ii) improving the domestic and international laws to most effectively prosecute computer and IP criminals; (iii) and directing multi-district and transnational cyber investigations and prosecutions. Again, harmonization of criminal law among EU Member States has taken place regarding computer crime on the basis of Article

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83.1 TFEU. Therefore—although not yet among the EPPO powers—computer crime with a cross-border dimension could reasonably become a prosecutable offense by the EPPO when it involves a cross-border dimension. The fact that the US system also confers such powers to the US Federal Prosecutors provides support for this option.

Sixth, regarding narcotics and dangerous drugs concern the following: (i) Combating domestic and international drug trafficking and narco-terrorism; (ii) drawing on available intelligence to prosecute individuals and criminal organizations posing the most significant drug trafficking threat to the US; (iii) enforcing laws that criminalize the extraterritorial manufacture or distribution of controlled substances intended for the US; (iv) and facilitating the provision of targeted intelligence support to DEA and other law enforcement agencies worldwide. The same basis and logic referred previously for child exploitation and computer crime as future prosecutable offenses by the EPPO, applies to drug trafficking. Included specifically in Art. 83.1 TFEU, this is one of the well-known pillars of enforcement by the US Federal Prosecutors.

Seventh, concerning organized crime involve the following: (i) Overseeing the Department's program to combat organized crime by investigating and prosecuting nationally and internationally significant organized crime organizations and gangs; (ii) exercising approval authority over all proposed federal prosecutions under the Racketeer Influenced and Corrupt Organizations (RICO) and Violent Crimes in Aid of Racketeering (VICAR) statutes; (iii) supporting criminal prosecutions of federal crimes involving labor-management disputes, the internal affairs of labor unions in the private sector, and the operation of employee pension and welfare benefit plans; (iv) working with US intelligence agencies and US and foreign law enforcement agencies to identify, target, and investigate transnational organized crime groups; (v) and contributing to the development of policy and legislation relating to numerous organized crime-related issues, including gambling and human trafficking.

Yet another example of currently non-prosecutable offenses by the EPPO, combating organized crime has been subject to EU harmonization through Article 83.1 TFEU and would be reasonable to include among EPPO's powers. This holds especially true if it is taken into account that organized crime many times has a cross-border dimension, even if the specific misconduct only surfaces in one Member State. It is also worth noting that offenses such as child exploitation and drug trafficking are most of times conducted by criminal organizations. Therefore, potential EPPO enforcement in such areas should also include organized crime, as is the case in the US system.

Eight, regarding money laundering and asset recovery involve the following: (i) Pursuing criminal prosecutions against financial institutions and individuals engaged in money laundering, Bank Secrecy Act, and sanctions violations; (ii) pursuing the proceeds of high level foreign corruption through the Kleptocracy Asset Recovery Initiative; (iii) developing legislative, regulatory, and policy initiatives to combat global illicit finance; (iv) returning

forfeited criminal proceeds to benefit those harmed by crime through remission and restoration processes; (v) and providing legal and policy assistance and training to federal, state, and local prosecutors, and law enforcement personnel, as well as to foreign governments.

Laundering the proceeds from the above-mentioned criminal activities is a regular activity conducted by the perpetrator of such offenses. Again, Article 83.1 TFEU has secured EU harmonization in this area, and it would be reasonable to conclude that it should also be part of the EPPO enforcement powers.

In sum, a comparison between the EPPO's and the US Federal Prosecutors' jurisdiction shows that the "expansion clause" established in Article 86.4 TFEU for the EPPO relates to the same areas of criminality currently being prosecuted by US Federal Prosecutors. The logic behind such expansion in both Unions is the need to effectively address serious cross-border criminality. Regarding the EU approach, such expansion would be consistent with the EU Security Agenda discussed previously.

#### **E. Conclusion: Prosecuting EU Financial Crimes, Dream or Reality?**

As seen above, on the one hand, the EU financial crimes system is not as developed as the American system when it comes to questions of enforcement and competences. Yet both systems are concerned with securing security across states. On the other hand, the EPPO regime and EU law in general is more matured, if you will, concerning the right to data protection and privacy as fundamental rights. A key difference between the EU and the US is the structure of both the EPPO and the USAO. While the US structure reflects the strong vertical federalism approach of the US system, the EPPO is based on the horizontal federalism that characterizes the EU approach to criminal law. The functioning of the complex structure of the EPPO is yet to be tested, but from the outset it is easy to see that it will have to surmount serious obstacles in order to provide effective responses to cross-border criminality, especially when national and supranational authorities might have conflicting interests.

The expansion of EPPO's jurisdiction would require an expansion of its budget. As noted, the current EPPO structure expects to cost about €375 million over the next 20 years. Yet, the yearly budget of the already expanded USAO Criminal Division is roughly 1.5 million USD.<sup>100</sup> The difference is outstanding. Yet, the amount collected by the USAO in criminal and civil debt is equally relevant: For FY 2015, it collected 21 million USD. Once the EPPO starts functioning it will be important to review the amount collected.

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<sup>100</sup> See U.S. ATTORNEYS (USA), <https://www.justice.gov/jmd/file/822056/download>.

In conclusion, prosecuting financial crimes could be more than mere wishful thinking. The more realistic question is perhaps to what extent we need the EPPO, and why prosecuting financial crimes is so important for the EU in a time with so many challenges to the EU project beyond the sphere of financial crimes. As is stated in preamble 19 of the EPPO regulation, the EPPO should issue a public Annual Report on its general activities, which at a minimum should contain statistical data on the work of the EPPO. It remains to be seen if the number of prosecutions is a good yardstick of the successfulness of the EPPO project.

Finally, it may seem a bit odd that the EU is only legislating on the prosecution of financial crimes, but leaves the question of criminal law defense largely untouched. The EU Charter of Fundamental Rights and European Convention on Human Rights are of course instrumental here as well as measures such as, *inter alia*, the Directive on Right to Access to Lawyer.<sup>101</sup> While the US has federal defense lawyers in place, the specialization of EU criminal law—as seen above—the question of fraud against the EU budget and related activities are often interconnected with EU—criminal—law and security governance in general—is still in its early days.

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<sup>101</sup> See Directive 2013/48/EU, on the Right of Access to a Lawyer in Criminal Proceedings and on the Right to Communicate Upon Arrest, 2013 O.J. (L 294) 1-12.