Recent Developments

European Criminal Justice Integration 5.0: Towards a European Public Prosecutor’s Office. By Johanna Goehler†

Each year, the European Union loses approximately €3 billion due to fraud.¹ National law enforcement authorities, although exclusively competent to prosecute offences against the EU’s budget, do not sufficiently intervene.² In times of economic crisis and declining citizen trust, the EU is no longer prepared to accept this waste of taxpayer money, and has recently proposed what has become the most controversial issue in EU criminal justice policy: the establishment of a European Public Prosecutor’s Office (EPPO).

I. THE SIGNIFICANCE OF A EUROPEAN PUBLIC PROSECUTOR

Currently, the administration of criminal justice within the EU is exclusively a task for the member states. EU involvement in criminal matters is limited to facilitating cooperation between the nation states, primarily through enhancing mutual recognition of judicial decisions, and secondarily through harmonizing specific areas of national criminal law. European law enforcement authorities and European criminal law sensu stricto do not yet exist. The EPPO would be the first supranational authority competent to prosecute crimes against the EU’s financial interests throughout the EU.³ Thus, the implementation of an EPPO would signal a paradigm shift. For the first time, the EU would take on direct responsibility for the protection of its financial interests, combat insufficient prosecution priorities of the member states, and

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² See id. at 6-7 (noting that “the rate of successful prosecutions... varies considerably across the EU”); Proposal for a Council Regulation on the Establishment of the European Public Prosecutor’s Office, at 2, COM (2013) 534 final (July 17, 2013) [hereinafter Proposal] (noting that “Member States’ criminal investigation and prosecution authorities are currently unable to achieve an equivalent level of protection and enforcement”.

³ The currently existing EU bodies Eurojust, Europol, and the European Anti-Fraud Office only coordinate national prosecution measures, but lack their own enforcement powers. See Christine van den Wyngaert, Eurojust and the European Public Prosecutor in the Corpus Juris Model: Water and Fire?, in Europe’s Area of Freedom, Security, and Justice 201, 206, 215 (Neil Walker ed., 2004). In addition to the proposed authority, the European Council may also extend the EPPO’s prosecutorial power to include serious crimes having cross-border dimensions. See Consolidated Version of the Treaty on the Functioning of the European Union art. 86(4), Mar. 30, 2010, 2010 O. J. (C 83/47) [hereinafter TFEU]. This expanded mandate would differ substantially from the current authority to prosecute financial crimes against the EU. See Marianne Wade, A European Public Prosecutor: Potential and Pitfalls, 59 Crime L. Soc. Change 439, 441-43 (2013).
offer a progressive answer to cross-border challenges in an open-border environment.

The proposal’s reformative and controversial character is indicated by its long history of evolution. By the 1990s, scholars had introduced the idea of a European public prosecutor; and in 2001, the European Commission took it up in a green paper. Yet, only the 2009 reformation of the EU core treaties gave the EU the actual legal power for its implementation, promoting the vision of a supranational prosecutor into a realistic possibility. With the recent economic crisis contributing to a favorable political climate, the EU has now finally initiated the legislative procedure to establish an EPPO.

II. CHALLENGES IN A MULTI-LEVEL GOVERNANCE SYSTEM

As the EU is pushing for the implementation of an EPPO, certain member states are concerned that a supranational prosecutor would interfere with something they regard as a core field of national sovereignty: their administration of criminal justice. In fact, Denmark, the United Kingdom, and Ireland have decided not to participate in the EPPO. Along similar lines, parliaments of eleven member states have filed complaints that the current legislative proposal fails to comply with the EU subsidiarity requirement. While some critics contest the overall need for action, others claim that the EU should instead strengthen the existing cooperation mechanisms. Such

6. See TFEU art. 86, supra note 3.
9. Consolidated Version of the Treaty on European Union art. 5(3), May 9, 2008, 2008 O. J. (C 115) 18 (“Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States . . . but can rather . . . be better achieved at Union level.”). Regarding the complaints, see Communication from the Commission to the European Parliament, the Council and the National Parliaments on the Review of the Proposal for a Council Regulation on the Establishment of the European Public Prosecutor’s Office with Regard to the Principle of Subsidiarity, in Accordance with Protocol No 2, COM (2013) 851 final (Nov. 27, 2013) [hereinafter Communication]. For a discussion on the underlying reasons for the member states’ resistance, see Katalin Ligeti & Michele Simonato, The European Public Prosecutor’s Office: Towards a Truly European Prosecution Service?, 4 NEW J. EUR. CRIM. L. 7, 8-10 (2013).
10. See Communication, supra note 9. For similar critiques among scholars, see, for example, Michele Caianiello, The Proposal for a Regulation on the Establishment of an European Public
interventions, these latter critics posit, would infringe less on national sovereignty and protect the EU budget more efficiently and cost-effectively.

These concerns reflect a widespread skepticism that has confronted the idea of an EPPO since its inception. Yet, with the recent economic crisis, the climate has changed. The current political and academic debate centers less on if the EPPO should exist and has instead shifted to how it should be established.

III. A DECENTRALIZED AND INTEGRATED MODEL

The proposed regulation on the establishment of the EPPO addresses various questions regarding the functioning of the future office. The rules that determine the envisioned EPPO's character most are those that govern its organization and modus operandi.

Regarding organization, the EPPO would be structured as an independent European institution consisting of a central authority and decentralized system of European delegated prosecutors. The European delegated prosecutors would be integrated into national prosecution systems and carry out operational work on behalf of the EPPO. The central authority would decide strategic matters, such as the EPPO's prosecution policy, and monitor operational work.12

Regarding the modus operandi, the EPPO would be competent13 to lead the investigation and prosecution of offenses against the EU's budget in the member states.14 The pretrial procedure would be governed primarily by the law of the member state on whose territory an investigation is conducted.15 EU law would only prescribe certain minimum standards;16 the enactment of a comprehensive European code of criminal procedure is not planned.17

11. Article 86(3) of TFEU outlines topics that the regulation must address, including the EPPO's structure and rules on procedure, evidence, and judicial review. TFEU art. 86(3).

12. The design of the central authority is highly controversial. While the Commission has proposed a hierarchical model headed by one chief European prosecutor, the member states prefer a more complex "college" structure, led by a board representing all member states. This preference is unsurprising since the college model would make the states more involved in the EPPO. See Draft Council Regulation, supra note 7, arts. 7-12.

13. The scope of its competence is contentious. Some national ministers who favor concurrent competence, see Draft Council Regulation, supra note 7, art. 19, object to the Commission’s Proposal’s grant of exclusive competence to the EPPO to investigate and prosecute criminal offences against the EU’s financial interests, see Proposal, supra note 2, art. 11(4).

14. Harmonized domestic law would define these offenses. For a detailed discussion of the substantive law applied by the EPPO see Bettina Weißer, Strafgesetzgebung durch die Europäische Union: Nicht nur ein Recht, sondern auch eine Pflicht? [EU Penal Legislation: Not Only a Right, But Also a Duty?], GOLTMAMMER’S ARCHIV FÜR STRAFRECHT 433 (2014) (Ger.).

15. Proposal, supra note 2, art. 11(3).

16. The minimum standards primarily concern investigative measures and procedural safeguards, see Proposal, supra note 2, arts. 26, 32-35.

the EPPO would bring its cases before domestic criminal courts, applying *lex fori*, since the EU treaties do not envisage the creation of a genuine European criminal court.

This brief introduction to the legislative proposal demonstrates certain key characteristics of the envisioned EPPO: decentralization, integration with the national legal systems with prevailing application of domestic law, and close cooperation with national law enforcement authorities. These characteristics may be surprising in the context of a supranational authority. Officially, they are justified as having practical advantages. Practically, they represent the reality that EU legislators must respect the member states' concerns over forfeiting their sovereignty when deciding on the design of the EPPO; otherwise, the member states will refuse to participate. The European Commission's decentralized and integrated approach is intended to mitigate these national concerns and promote greater support for the proposal among the member states. Clearly, criminal justice initiatives in the EU multi-level governance system have to reconcile this tension. Yet the European legislators will have to tread carefully to ensure that this endeavor does not jeopardize the efficiency of the future Office or its commitment to due process. Two amendments are needed to address these perils.

First, the proposed system of judicial review for measures undertaken by the EPPO needs to be revised. The current proposal suggests entrusting the member states with the judicial control of the EPPO. Yet this approach would result in a random variation, and in some instances, complete absence of judicial review, especially with regard to EPPO’s dismissal decisions. To guarantee an efficient prosecution throughout the EU, a supranational solution to judicial review on EPPO’s dismissal decisions is necessary. Second, in order to secure equality of arms and due process, EU criminal justice initiatives will have to strengthen not only transnational prosecution, but equally transnational defense.

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18. The EPPO would choose the court in compliance with statutory criteria. See Proposal, supra note 2, art. 27.

19. For scholarly critiques of this proposed structure, see, for example, Grünewald, supra note 17, at 515; Caianiello, supra note 10, at 123-25. For a more positive perspective on the initial "low key compromise" that an EPPO requires from states, see Ligeti & Simonato, supra note 9, at 21.


CONCLUSION AND FORECAST

The ultimate rules for establishing the EPPO remain intensely debated. Certain provisions still require close scrutiny and revision to guarantee the creation of a supranational office dedicated to justice and efficiency. Despite these controversies, the EPPO project is closer to reality than it has ever been before. An immediate EU-wide implementation would require unanimity in the Council of the EU. Nevertheless, with the cooperation of at least nine member states, the EPPO could begin as an enhanced cooperation project. Given the initiative of supportive member states such as Germany and France, the introduction of enhanced cooperation is very realistic. As such, the EPPO would start off akin to successful EU projects like the Schengen Agreement, whose scope of application has since been extended.

For EU integration, the implementation of an EPPO would signal a paradigm shift. The introduction of a supranational prosecutor would revolutionize criminal prosecution systems that rely on interstate cooperation. Through this move, the EU would take a step towards creating a truly European area of criminal justice and taking on a lead role in the European criminal justice administration.

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23. TFEU art. 86(1), supra note 3.
Recent Developments

The Role of Civil Society Organizations in the United States’ Recently-Concluded CERD Review. By Bradley Silverman†

In recent years, American civil society organizations (CSOs) have taken on a more active role in monitoring and enforcing America’s compliance with a variety of its obligations under international law. CSOs have engaged in a human rights monitoring and enforcement strategy to pursue their missions. CSOs are interacting with a variety of global enforcement monitors to hold the United States’ feet to the fire—spotlighting areas where they believe the United States has fallen short of its responsibilities to protect and advance social justice. This Recent Development will examine the United States’ recently concluded Convention on the Elimination of all forms of Racial Discrimination periodic review to illustrate and explore both its mechanics and implications.

In 1994, the United States ratified the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), which obligates signatories to take affirmative measures to combat racial discrimination. The Convention established the Committee on the Elimination of Racial Discrimination (CERD Committee) to monitor its implementation in signatory states. As a signatory to the Convention, the United States is obligated to submit a report every two years “on the legislative, judicial, administrative or other measures . . . [it has] adopted” to promote racial equality. Recently, the United States completed its third periodic review, submitting a report to the United Nations in June 2013 and appearing before the CERD this past August in Geneva, Switzerland.

Under the terms of its ratification, the Convention is not a self-executing law in this country. Human rights advocates use CERD review to bring

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3. Id. art. 8.

4. Id. art. 9(1).


7. U.S. Reservations, Declarations, and Understandings, International Convention on the
pressure to bear on the United States to pursue policies to reduce racial disparities in American society. To that end, CSOs “engage with [CERD] and its work” in numerous ways before, during, and after formal review sessions: they participate in the preparation of the government’s own reports, lobby at review sessions, and monitor domestic Convention implementation. CSOs make their most significant contribution to the review process through the submission of “shadow reports,” which augment and contextualize the United States’ formal reports by detailing areas where the United States allegedly has failed to meet its Convention obligations, shedding light on “what is actually happening on a daily basis to communities of color across the U.S.” Many shadow reports seek to bring issues within the ambit of CERD review by tying a government practice, policy, or inaction to either discriminatory purpose or effect, both of which are incorporated into the CERD definition of “racial discrimination.”

This cycle, CSOs played a more prominent role in the United States’ CERD review than ever before, contributing dozens of reports on topics ranging from housing to accessible medical care to the rights of indigenous peoples. To enhance the efficacy of their presentations, CSOs coordinated their advocacy efforts through a U.S. Human Rights Network-established umbrella organization, the CERD Taskforce. This Taskforce was created to “serve as the primary coordinating body for social justice groups and individuals interested in using [CERD] to advance racial justice in the United States.” By serving as a central organizing body and information resource for CSOs seeking to lever the CERD review process for human rights advocacy, the Taskforce would “facilitate broad engagement in the [CERD] review process” and “promote [CSO] participation in civil society and government consultations.” Though a prior Taskforce had played a coordinating role during the prior CERD review cycle, the 2014 process represented a high-water mark of CSO engagement with CERD review.

The Taskforce synchronized CSOs’ advocacy efforts by “disseminating...
information relevant to the CERD review of the United States among them. As CSOs worked on their reports, the Taskforce provided a wealth of background knowledge and educational resources, including information on the Convention’s interaction with domestic civil rights law and applicability to particular discriminated-against communities. It also “coordinate[d] the submission of shadow reports and other relevant written responses” by providing tools and training to assist CSOs with their report writing. The mechanics of shadow report writing were unfamiliar to the many CSOs that were participating in the review process for the first time. In addition to producing a template, sample reports, and guidelines on effective writing, the Taskforce guided CSOs through various aspects of the writing process, including identifying organizational expertise and allies.

The Taskforce also coordinated the human rights community’s direct engagement with government officials before and during official proceedings in August. In the months leading up to its appearance before CERD in Geneva, the United States repeatedly consulted with CSOs. In Geneva, the Taskforce planned or proposed a schedule of meetings, including a proposed meeting with U.N. entities such as the Civil Society Unit, Special Rapporteurs, and High Commissioner of Human Rights.

It is too soon to measure the influence that CSOs wielded in CERD review or to fully ascertain the impacts of their participation. The review process went virtually unnoticed by American media outlets, which devoted

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16. Id.
little if any coverage to the proceedings or to comparisons of the process’s outcomes with those of prior years. There is reason, however, to believe that CSOs made a meaningful impact. During the CERD review cycle, forty-six shadow reports were submitted through the Taskforce.26 This figure constitutes a 27.8% increase from the thirty-six reports submitted through the Taskforce during the 2008 review cycle.27 Moreover, many recommendations found in CERD’s Concluding Observations28 offered suggestions for continuing reform, reflecting concrete proposals suggested in shadow reports, such as the need for a state-federal coordinating mechanism for CERD implementation.29 However, many recommendations are framed at a level of generality such that it is difficult to determine the degree to which they reflect CSO input. CERD pointedly recommended that the United States “continue consulting and expanding its dialogue with [CSOs] working in the area of human rights protection, in particular in combating racial discrimination, in connection with the preparation of the next periodic report and the follow-up to these concluding observations.”30

Three months after CERD review concluded, CSOs weighed in on the United States’ periodic review under the Convention Against Torture,31 again highlighting American shortcomings.32 A campaign to influence the United States’ Universal Periodic Review33 in 2015 is underway.34 The Taskforce’s apparent success in mobilizing and coordinating CSOs’ engagement with CERD review suggests the continuing potency of this approach not only with respect to future CERD review cycles, but potentially many other domains of human rights monitoring as well.

29. Id. at 2-3; see also LAWYERS’ COMM. FOR CIVIL RIGHTS UNDER LAW, U.S. FEDERALISM AND ITS IMPACT ON ICERD COMPLIANCE 5 (2014).