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**The Need of the European Public Prosecutor's Office
in the Context of Strengthening the Integration**

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Abstract: In this research we intend to have an objective analysis on the necessity of establishing within the European Union an institution with the role of tracking, investigating prosecuting criminal cases on union funds fraud. Based on the annual losses estimated to hundreds of millions of euros on which there are suspicions of fraud and the success rate of the prosecutions concerning the offenses against the EU budget, which varies considerably from one Member State to another (while the EU average is only 42.3 %), the European Commission, as the institution responsible for implementing policies and spending the EU funds proposed the establishment, starting from 1st January 2015, of the European Public Prosecutor's Office (EPPO) as union body for protecting these funds effectively and consistently in all Member States. Continuing the process of European integration requires an increased cooperation between Member States for the effective protection of the EU financial interests against fraud. Our analysis attempts to clarify to what extent the European Public Prosecutor's Office would be another step towards the completion of, along with the European Anti-Fraud Office (OLAF), Europol and Eurojust, a palette of union bodies called upon to provide the necessary protection for the proper functioning of the European Union as a whole.

Keywords: union budget; fight against fraud; criminal proceedings; national authorities

1. Premise

The problem of protecting the financial interests of the European Union against fraud occurred with the increase of the number of Member States and the volume of financial transactions, whether these frauds aimed community expenditures or revenues.

To this end, the Commission established in 1988, the Fraud Coordination Unit, which transformed its structure since 1999 in Anti-Fraud Office (OLAF), which functions as an independent administrative independent control body, with departments in each of the EU countries. OLAF together with Europol, Eurojust, the European Union Agency for Fundamental Rights and Frontex form the institutional structure for the prevention and combating of offenses, along with the national law enforcement agencies, the rule of law which concerns crimes in the European Union and Schengen Area. While all the other listed organisms have demonstrated high degree of efficacy, in most areas of competence, OLAF has often attracted criticism on the reduced efficiency in preventing and combating fraud, motivated mainly by the quality of the administrative body, with limited competences.

At the same time, as annually a growing percentage of the EU budget is diverted through fraud², the responsible law enforcement agencies of the Member States show a variety of thought-provoking situations. Thus, for example, if in accordance with the statistics, in Lithuania there have been sentenced to the 88 % of those investigated for fraud, Finland, 91.7%, 64.3% in Belgium, France 75%,

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² According to official data, fraud through various forms to the EU budget amounts between 1 and 10% of its volume.

in Germany 57%, in Romania there were only 23.4% convictions. There were recorded a lower percentage in Greece for example. The European average is of 42.3% convictions. The statistics can certainly be misleading, but the conducted analyzes cannot disregard them.

Consequently, the European Commission proposed on 17 July 2013 that from 1st January 2015 to be set up a European Public Prosecutor's Office (EPPO) to conduct investigations and prosecutions, but also to have the power to prosecute in the courts of the Member States, the persons accused of crimes affecting the EU budget. It is considered a large number of irregularities that may affect the union's budget, (Gyula, 2012, p. 222) whether it is **fraud affecting the collection of revenue**, such as the use of false documents as proof of preferential origin, forgery of union documents for goods, various forms of smuggling and evasion of VAT or the unjustified request of VAT reimbursement, or the **fraudulent increase of expenditure**, through the "carousel" method, falsifying a destination state where the amount of the subsidy is higher, forging the quality or quantity of subsidized goods, justifying the structural fund expenditures, by false documents and misappropriating the European funds from their destination by false documents, etc.

The main argument that the Commission of Brussels brings is that perpetrators or suspects of offenses with European funds are using the subterfuge made available by the national jurisdictions in order to get away unpunished and according to the EU treaties, they mainly do not allow OLAF, Europol and Eurojust to have enough competences in criminal prosecution.

According to the Commission's view, the establishment of a European Public Prosecutor's Office (EPPO) would lead to improving this situation, although the cases handled by prosecutors would be appointed to Brussels and they will be gone to trial still in national courts.

The idea of establishing a European Public Prosecutor's Office (EPPO) is not new, it dates back in 1997, when at the request of the Commission and the European Parliament, a group of experts drafted the code of rules to protect the financial interests of the European Union containing provisions both procedural and substantive, entitled *Corpus Iuris*. (Delmas–Marty, 1997)

The need for the establishment of a European Prosecutor's Office has been discussed for several years, creating multiple controversies, being finally included in the content of the Lisbon Treaty by expanding the areas in which the Commission has legislative initiative, including areas previously belonged to Pillar III - Police and Judicial Cooperation in criminal matters.

The Treaty on the Functioning of the European Union (TFEU), following the changes suffered by the Lisbon Treaty created the possibility of a European Public Prosecutor's Office.

Its aim would be combating offenses relating to grants of the European Union, but there is the possibility of the adoption by the European Council of a decision amending article 86 TFEU in the sense of expanding the competences of such office on the cross-border organized crime as well.

In turn, the European Parliament, with the participation of all Member States presume, believes that the establishment of a European Public Prosecutor's Office could provide the area of freedom, security and justice "*an added value of great importance, as the financial interests of the Union and, consequently, the European taxpayers' interests must be protected in all Member States*".¹

¹ The Interim Report of the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament on the proposal for a Council Regulation of establishing a European Prosecutor's Office. (COM(2013)0534 – 2013/0255(APP)).

2. Brief Presentation of the Legislative Proposal

Under the proposal for a Council Regulation initiated by the Commission, the European Public Prosecutor's Office will have a decentralized structure, integrated into the national legal systems. The delegated European Prosecutors will conduct investigations and prosecutions in their Member State, using national staff and applying national legislation, and their actions will be coordinated by the European Public Prosecutor, in order to ensure a consistent approach across the EU's territory, a vital aspect especially in cross-border cases. The entire structure will be based on the existing resources and should therefore not involve substantial additional costs.

The European Prosecutor should have a hierarchical form to be led by a prosecutor appointed by the Commission with the approval of the European Parliament for a term of eight years with the possibility of renewal of this mandate. The Chief Prosecutor shall be assisted by deputies also appointed by the Commission and the Member States and also prosecutors' delegates whom he appoints and dismisses himself.

European Public Prosecutor's Office will have the competence that at the completion of a survey it would be able to choose the court, which will be notify the indictment, not belonging to a particular court, without taking into account the EU courts, which do not yet have jurisdiction in criminal matters.

This form is considered that it could favor a better integration of the new institution into the national systems enabling them to be more readily accepted by the practitioners of Member States.

Along with the discussions and procedures for the establishment of such bodies of the Union with the officials with investigating and prosecuting tasks appeared also the need to create the necessary framework to guarantee the procedural rights and appeal of the investigation, in accordance with the national law of each State, but also with the jurisprudence in the domain of human rights.

The main procedural rights of the persons that might be covered by the European Public Prosecutor's Office investigations may constitute themselves a distinct research topic, which is why we will mention only the most important ones:

- the right to remain silent and to be presumed innocent;
- the right to interpretation and translation;
- the right to information and access to the file;
- the right to counseling, the right to a lawyer, in case of arrest;
- the right to present evidence and the right to examine witnesses.

In order to ensure the minimum legal framework necessary for the functioning of the European Public Prosecutor's Office, the EU legislative institutions will need to adopt a package of legislative acts such as the proposal for a Directive on combating fraud against the Union's financial interests through criminal law, the proposal for a Regulation on European Union Agency Cooperation in criminal justice matters (Eurojust) and other relevant instruments in the field from the criminal justice domain and procedural rights.

3. The Advantages of Establishing the European Public Prosecutor's Office

Renouncing at the bureaucratic and cumbersome procedure of rogatory commissions by creating the possibility for the European prosecutors to carry out investigation of fraud to the Union budget directly in several EU member states territory would be a great asset for the rapid accountability of the guilty persons of such offenses.

It is undeniable that under these circumstances, new European body proposed to be established with exclusive jurisdiction and with effective operative attributions could prosecute more effectively cases of cross-border crimes.

According to the depositions from the proposal for a Council Regulation, the European Prosecutor's Office should receive full independence, both from national governments and from EU institutions and it should be protected from any political pressure.

According to the Parliament which agreed upon the draft of Council Regulation proposed by the Commission in its meeting of 03.12.2014, the establishment of a European Public Prosecutor could bring the area of freedom, security and justice "*an added value of great importance, as the financial interests of the Union and, consequently, the European taxpayers' interests must be protected in all Member States*", as previously mentioned.

The practical integration of the European Public Prosecutor's Office in the decentralized structures, by participating, as "special adviser" of national prosecutors delegates can also be an advantage in favor of maintaining an efficient cooperation, the new institution and the authorities in the field of Member States.

The organization model proposed by the Public Prosecutor's Office can provide training, at central level, skills, experience and knowledge at an appropriate level of the legal systems of the Member States while preparing European prosecutors' delegates and their staff in the EU criminal law in a uniform and effective way.

Also the Public Prosecutor's Office can transmit the cross-border admissibility of the evidence, which could contribute to increasing the efficiency of the criminal proceedings, without prejudice to the national sovereignty on this issue.

To the national courts it would be given the task of carrying out the judicial control, which means that the European Public Prosecutor's actions could be challenged in national courts. At the same time, the proposal strengthens significantly the procedural rights of the suspected persons, which shall be subject to the investigations carried out by the European Public Prosecutor's Office.

4. Some Critical Remarks

Pros and cons assessments made by experts vary from designating the European Prosecutor as the "most objective institution of the world" (Gyula, 2012, p. 229) to the denial of its necessity altogether.

It is obvious that, in order to achieve the goal, it should be set clear rules on the functioning of the European Public Prosecutor's Office, as the current wording of the Regulation proposed by the Commission, it would be assigned as an "excessive freedom" in terms of the various criteria of jurisdiction. Thus the competence area of the European Public Prosecutor's Office should be defined precisely, enabling *ex ante* the identification of the criminal acts which they will investigate.

In this regard, there is a significant need to define evenly the entire area of the EU jurisdiction of the criminal actions which fall within the competence of the European Public Prosecutor's Office investigation which actually would mean the birth of a substantive law of the European Union.¹

In turn, the investigating instruments and measures available to the European Public Prosecutor's Office should be "uniform, clearly identified and consistent with the laws of the Member States in which they are implemented", which in turn foreshadows the need for procedural criminal law of the EU. Besides, the problem of criminal law that will have to apply the court, especially the admissibility of certain types of evidence, such as telephone records, but others as well, it highlights the need for a concrete systematization of rules of inquiry, different from the current legal order of the Member States.

A serious criticism, which otherwise calls into question whether the Commission's initiative to establish a European Public Prosecutor's Office will have the expected outcome, is that the proposed regulation is not according to the "principle of subsidiarity". On this position was also the Chamber of Deputies of Romania who gave a "motivated notification" to the draft regulation.² The reasoning behind the criticism, the Chamber of Deputies sustains that the Commission's proposal is insufficiently grounded regarding the added value that it would bring the new criminal jurisdiction in the European Union. In other words, there are not sufficiently convincing arguments that the European Public Prosecutor's Office will be able to give a better response to union budget fraud than the national prosecutor currently does. Also it was argued that since "a fraud is committed at national or local level, the adequate combat of this fraud depends primarily on the measures taken to this level", and that an "exclusive competence" of the European Public Prosecutor's Office in criminal investigation and prosecution of offenders against the financial interests of the EU raises "doubts on complying the principle of legal security, since it is not subject to any form of appeal."

In the academic doctrine there were expressed opinions including criticism according to which there will be spent more money for the organization and functioning of the European Public Prosecutor's Office than the benefits it would bring from the crime reduction which it brings prejudices to the union budget. This question arises more acutely especially in the entrepreneurial approach to certain categories of investigation in many EU Member States, namely the timeliness analysis through the benefit-cost binomial.

5. Brief Conclusions

The objective of proposing for a Council Regulation on the establishment of the European Public Prosecutor's office initiated by the Commission is a step towards the achievement of a European area of criminal justice and strengthening the fight against fraud affecting the financial interests of the Union, thus increasing the confidence in the EU taxpayers, amid a more manifested Euro-skepticism.

The establishment of the European Public Prosecutor's Office institution could be a first concrete step towards a European criminal justice, simultaneously or immediately followed by the adoption of a

¹ Currently, the European Parliament and the Council, deciding only directives in accordance with the ordinary legislative procedure; it may establish only minimum rules concerning the definition of criminal offenses and sanctions in the areas of serious cross-border crime such as: terrorism, human trafficking and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, cybercrime, counterfeiting of means of payment and organized crime.

² Several Member States Parliaments among which: Sweden, UK, Netherlands, Cyprus, Hungary, Ireland and Slovenia have submitted such motivated notifications.

European Criminal Code and a Code of European Criminal Procedure. This action must obey all the rights guaranteed by the Charter of fundamental rights of the European Union, the European Convention for the Protection of Human Rights and the Jurisprudence of the European Court of Human Rights.

The European Public Prosecutor's Office could play a crucial role in terms of how to conduct the internal investigations within the EU institutions, in cases of suspected fraud.

The European Anti-Fraud Office (OLAF) will continue to conduct major activities in combating fraud in areas falling within the competence of the new prosecutor's office. It is the case of the facts affecting the financial interests of the EU, but do not meet the constitutive elements of an offense, and serious disciplinary transgressions and crimes committed by the EU staff, but which do not have a financial impact.

In accordance with article 86 TFEU, the establishment of the European Public Prosecutor's Office can be achieved by regulation, by unanimous vote of the Council and the approval of the European Parliament. In the case where unanimity cannot be achieved, there may be applied the consolidated cooperation rules (a minimum of nine Member States may establish the European Public Prosecutor's Office). These states must notify the European Parliament, the Commission and Council in order to take into consideration the consolidated cooperation as being authorized according to article 20 paragraph 2 of the TEU and article 329 TFEU. However it is highlighted the fact that a European Public Prosecutor's Office that would operate on the basis of consolidated cooperation, only for some of the Member States, in a union formed currently of 28 countries, will not be effective. The final decision will be taken by the Council.

6. References

Delmas-Marty, M. (coord.) (1997). *Corpus Iuris, Introducing Penal Provisions for the Purpose of the Financial Interest of the European Union*. Economica: Paris.

Gyula Fabian (2012). *Drept instituțional al Uniunii Europene/Institutional law of the European Union*. Bucharest: Hamangiu.

Sergiu, Bogdan (2001). Câteva considerații privind mijloacele juridice de combatere a fraudei în Uniunea Europeană/Some considerations on legal means to combat fraud in the European Union. *Studia Iurisprudentia Universitatis Babeș-Bolyai*, no. 1.

*** Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (OJEU C 306 of 17 December 2007).

*** Parliament and Council Regulation no. 1073 of 25 May 1999 on the investigations conducted by OLAF (OJEC L 136 of 31 May 1999).

*** EU Council document no 8614/10 of 15 April 2010, The European Public Prosecutor's Office in the European judicial area (JAI /306, COPEN 99 Eurojust 43).

Online Sources

http://europa.eu/rapid/press-release_MEMO-13-693_en.htm.

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2014-0141+0+DOC+XML+V0//RO>.