THE EUROPEAN PUBLIC PROSECUTION SERVICE

CONTRIBUTION TO THE REALISATION OF THE EUROPEAN UNION’S AREA OF FREEDOM, SECURITY AND JUSTICE

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FOREWORD
During my traineeship at the Ministry of Justice in The Hague, I had to search for some articles on the European Public Prosecution Service. Later that year, throughout a lecture on the European Union’s area of freedom, security and justice, the Prosecution Service was briefly mentioned. It was this lecture that triggered me to examine the Public Prosecutor.

In this research I give my opinion and comments on the proposal/possibility to establish a European Public Prosecution Service.

I dedicate my thesis to my parents, Helga & Nico Vermeulen and my partner, Sander van Riel. Without them I wouldn’t be able to finish my study.

I want to thank my coach, Conny Rijken, for the approval of my research proposal and the comments she gave on my thesis.
Foreword .................................................................................................................... 1
Abbreviation list ......................................................................................................... 6
Introduction ................................................................................................................ 7
I The European Public Prosecution Service .............................................................. 9
   I.1. History of the proposal ..................................................................................... 9
   I.2. Treaty of Lisbon .............................................................................................. 10
   I.3. Terminology ................................................................................................... 10
      I.3.1. The status of the European Public Prosecutor ......................................... 12
         I.3.1.1. Appointment procedure ................................................................. 13
         I.3.1.2. Term of office .................................................................................. 14
      I.3.2. The status of the Deputy European Public Prosecutors .......................... 15
         I.3.2.1. Appointment procedure ................................................................. 15
         I.3.2.2. Term of office .................................................................................. 17
      I.3.3. Staff ......................................................................................................... 18
      I.3.4. The position of the European Public Prosecution Service ....................... 18
   I.4. The area of freedom, security and justice ...................................................... 20
      I.4.1. History .................................................................................................... 20
      I.4.2. Current provisions ................................................................................... 20
      I.4.3. Freedom, security and justice ................................................................ 21
      I.4.4. Area ........................................................................................................ 22
II The added value .................................................................................................... 23
   II.1. Organized crime ............................................................................................ 23
   II.2. Single prosecution area .................................................................................. 25
   II.3. Financial interests of the European Union .................................................... 27
II.4. Other cross-border crimes ................................................................. 28

III Procedure ............................................................................................ 30

III.1. Preparatory stage ........................................................................... 30
  III.1.1. Information and referral ............................................................... 30
  III.1.2. Prosecution choice .................................................................... 33

III.2. Pre-Trial judge .............................................................................. 34
  III.2.1. Arrest warrant .......................................................................... 36
  III.2.2. Evidence ................................................................................... 36
  III.2.3. Defence ...................................................................................... 38
    III.2.3.1. Offender/suspect ................................................................. 38
    III.2.3.2. Accused .............................................................................. 39
    III.2.3.3. Legal representation ......................................................... 39
    III.2.3.4. Ne bis in idem ................................................................. 39

III.3. Trial stage .................................................................................... 40
  III.3.1. Judge at first instance ............................................................... 40
  III.3.2. Appeal ...................................................................................... 42

III.4. Execution stage ............................................................................ 42

III.5. Relationship with other bodies .................................................... 43
  III.5.1. Eurojust ................................................................................... 43
    III.5.1.1 Background ........................................................................ 44
    III.5.1.2. Decisions ......................................................................... 46
    III.5.1.3. Cooperation with other bodies ....................................... 48
      III.5.1.3.1. EJN ....................................................................... 48
      III.5.1.3.2. OLAF ..................................................................... 49
      III.5.3.1.3. Europol ................................................................. 49
<table>
<thead>
<tr>
<th>ABBREVIATION LIST</th>
</tr>
</thead>
<tbody>
<tr>
<td>AFSJ</td>
</tr>
<tr>
<td>DP</td>
</tr>
<tr>
<td>ECJ</td>
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<tr>
<td>ECC</td>
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<td>OLAF</td>
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<td>TEU</td>
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<tr>
<td>TFEU</td>
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</tbody>
</table>
INTRODUCTION

‘It has become a commonplace to say that crime does not stop at national boundaries. The result of this is that states alone cannot protect their citizens against crime. In the European Union this problem becomes all the more apparent. Closer cooperation between the states is an obvious response to this phenomenon.' Van den Wyngaert also explains that the ‘traditional way in which states have always cooperated in criminal matters has been by entering into international cooperation agreements in criminal matters in various forms. Only in recent times the EU has decided to develop its own rules and mechanisms in these [criminal] fields, sometimes as an substitute, sometimes as a complement to the existing Council of Europe conventions’ and sometimes as a new European concept.\(^1\)

In the context of the Nice Intergovernmental Conference, the European Commission proposed, as a response to fraud against the “Community’s financial interests”, to remedy the fragmentation of the European law enforcement area by establishing a European Public Prosecution Service. A less radical proposal got ahead of the Service: Eurojust was put into the European Union Treaty. The Prosecution Service is only recently placed in the Lisbon Treaty.

The European Union was frequently portrayed as the facade of a Greek temple resting on three columns. The first pillar encompassed broadly the European Community; the second was related to the Common Foreign and Security Policy and the third dealt with Police and Judicial Cooperation in Criminal Matters.\(^2\) With the entering into force of the Treaty of Lisbon\(^3\) this temple collapsed.

The research goal is to examine the necessity of the establishment of the European Public Prosecution Service regarding the realization of the area of freedom, security and justice within the European Union. The central question is the following.

\(^1\) Van den Wyngaert, p. 201.
\(^3\) Throughout this research I used the terminology of the Treaty of Lisbon. However, the terminology which dates pre-Lisbon may appear in the quotations of literature and legislation.
How can the European Public Prosecution Service contribute to the realisation of the European Union’s area of freedom, security and justice?

To formulate an answer on the above mentioned question it is important to know, in the first place, what is meant with the Prosecution Service. In the first chapter I examine the history of the proposal and explain the terminology I prefer to use; the proposed status and position within the Union; and the area of freedom, security and justice. The idea behind the proposal, the added value it should have, is discussed in chapter II. Chapter III deals with the possible procedural rules for the functioning of the Service. Also the cooperation with other institutions is envisaged. Finally the feasibility is studied in chapter IV. Out of all these research results I will distillate a conclusion.
I THE EUROPEAN PUBLIC PROSECUTION SERVICE

I.1. HISTORY OF THE PROPOSAL

‘The idea of a European Public Prosecutor was developed in 1997 by a group of academics who came to the conclusion that the current system of purely national investigation and prosecutions of crimes against the financial interests of the EC was totally inadequate.’ They wrote the so called Corpus Juris, which entails descriptions of certain financial crimes against the Community and powers of the proposed Prosecutor. It “Europeanizes” the function of the public prosecutor.  

‘The European Commission formally proposed the creation of a European Public [Prosecution Service] in its Additional Communication to the Intergovernmental Conference of 29 September 2000 in which it called for an amendment to the EC Treaty. Meanwhile, the European Council of Tampere in 1999 had proposed the introduction of Eurojust and, unsurprisingly, the Intergovernmental Conference of Nice in December 2000 did not accept the Commission’s more ambitious proposal to introduce the European Public [Prosecution Service] in the Treaty. It decided to go forward with Eurojust instead.’ However, in December 2001 the Commission published a Green Paper on criminal law protection of the financial interests of the Community and the establishment of a European Prosecutor. In May 2002, the Commission repeated its proposal to set up a European Public Prosecutor in its Communication to Working Group X.  

The Green Paper facilitates discussion ‘of two crucial questions:

- how the [EPPS] can be established without also establishing a special Community Court with jurisdiction to review acts done by him;

- and how far it is necessary to harmonise the law for him to be able to operate effectively’.  

Since 1 December 2009 article 86 of the Treaty on the Functioning of the European Union made it possible to establish an EPPS.  

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5 Van den Wyngaert, p. 216.
I.2. TREATY OF LISBON

The Treaty on the Functioning of the European Union organizes the operation of the Union. ‘In addition, it determines the areas of, the de-limitation of, and the arrangements for the exercising of its competences.’\(^8\) Both the TFEU and the Treaty on European Union constitute the treaties upon which the Union is founded and have the same legal value according to article 1 section 2 TFEU.

As Klip explains this “fusion” of the pillars, as already stipulated in the introduction, has consequences. The result of the synthesis of the internal market and the area of freedom, security and justice is that ‘all the principles that have been developed under Community law for the realization of the internal market are now fully applicable to all fields of Union law’. So, including the criminal law area. The principle of sincere cooperation is one of the principles that stimulates the harmonizing effect on the national criminal laws. It’s because of the assistance in full mutual respect that brings the best practices together, which can lead to harmonization.

\textit{Article 4(3) ToEU}

Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The choice how to implement legislation is left to the Member States. A directive can, as the example of Klip makes clear, be implemented in Germany by civil law, in Estonia by administrative law, and in The Netherlands by criminal law. Though the instruments of the former third pillar hardly left no choice for the Member States than to implement them in criminal law. In the fight against the abuse of the Union’s finances criminal law would be the main instrument of enforcement for the EPPS.\(^9\)

I.3. TERMINOLOGY

The establishment of a Prosecution Service was proposed in the earlier brought up \textit{Corpus Juris}. The Prosecutor is defined in its article 18(2).

The \textit{EPP} is an authority of the European Community, responsible for investigation, prosecution, committal to trial, presenting the prosecution case at trial and the execution of

\(^7\) Van den Wyngaert, p. 215-216.
\(^8\) Klip 2009, p. 19.
sentences concerning the offences defined [in articles 1-8]. It is independent as regards both national authorities and Community institutions.\textsuperscript{10}

Delmas-Marty and the other authors describe further more in article 18(3) that

the EPP consists of a \textit{European Director of Public Prosecution} (EDPP) whose offices are based in Brussels and \textit{European Delegated Public Prosecutors} (EDelPPs) whose offices are based in the capital of each Member State, or any other town where the competent court sits on application of article 26.\textsuperscript{11}

The Commission in its Green Paper refers to both \textit{European Public Prosecutor} (in line with the \textit{Corpus Juris}) and \textit{European Prosecution Service} as the proposed body. The first reference may also be used to refer to the person leading the body, while it moreover uses the term Chief European Public Prosecutor as well (the Corpus refers specifically to the EDPP).\textsuperscript{12} \textit{Corpus Juris’} EDelPPs are renamed by the Green Paper as Deputy European Public Prosecutors.\textsuperscript{13}

The current legal text of article 86 TFEU speaks about the \textit{European Public Prosecutor’s Office}.

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 \textit{European Public Prosecutor’s Office} from Eurojust. The Council shall act unanimously after obtaining the consent of the European Parliament.

   In the absence of unanimity in the Council, a group of at least nine Member States may request that the draft regulation be referred to the European Council. In that case, the procedure in the Council shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council for adoption.

   Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft regulation concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorization to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

2. The \textit{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, offences against the Union’s financial interests, as

\textsuperscript{10} Delmas-Marty & Vervaele 2000, p. 196.
\textsuperscript{11} Delmas-Marty & Vervaele 2000, p. 196.
\textsuperscript{12} COM(2001) 715 final, p. 27.
\textsuperscript{13} COM(2001) 715 final, p. 29.
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 offences.

3. The regulations referred to in paragraph 1 shall determine the general rules applicable to the European Public Prosecutor’s Office, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions.

4. The European Council may, at the same time or subsequently, adopt a decision amending paragraph 1 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 2 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.

The Treaty doesn’t speak about a form of Deputy Prosecutors. Though it provides for the obligation to make secondary legislation on the internal organization as states in article 86(3) TFEU.

When speaking of the European Public Prosecutor as an “organisation” on the one hand and as a “director” on the other hand, the Commission seems to exclude the Deputy Prosecutors from the proposed organisation. In my view there must be a clear line between the name of the organisation and the subjects which are part of the organisation. For that reason, I would tend to follow the legal terminology (of the TFEU) when referring to the institution, but in my understanding the term “office” is more related to a building or a desk, while “service”, as brought up by the Commission, sees on assistance or help that can be provided. I agree with Fijnaut and Groenhuijsen who also prefer to speak of a European Public Prosecution Service.  

I use the term “European Public Prosecutor” when speaking of the director of the Prosecution Service. As I make clear later on when discussing the status of the Deputy Prosecutors, it is appropriate not to speak of Delegated Public Prosecutors, but of Deputy Public Prosecutors.

A kind of definition of a prosecutor in general is necessary to understand the concept of the status of a European Prosecutor. Using Radtke’s article, a public prosecutor is ‘the authority of criminal prosecution [which] plays a part in the preparation of the subject-matter of the trial and it does so independently from the trial judge(s). It has to investigate objectively and it sees that procedural rules are adhered to at the same time.’

I.3.1.1. APPOINTMENT PROCEDURE

As the authors of the Corpus Juris point out in the above mentioned article 18(2), the EPPS must be ‘independent as regards both national authorities and Community institutions’. The European Prosecutor as the director of the Service falls under this same independent status. The academics rightly mention that there always remains a ‘risk of nomination of a European Prosecutor who could be amenable to political influence’. For that reason the Corpus Juris acknowledges that there is a need to add a provision ‘saying that the members of the [EPPS] are independent in the performance of their duties and that, in the performance of those duties, they must neither seek nor take instructions from any body. They may not, during their term of office, engage in any other occupation, whether gainful or not.’

The nomination of the EPP could be based on (a part of) article 253 TFEU. The Judges and Advocates-General of the Court of Justice shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurists of recognized competence; they shall be appointed by common accord of the governments of the Member States for a term of six years, after consultation of the panel provided for in Article 255.

‘The EPP would be nominated by the European Parliament on a proposal by the Commission.’

The Commission in its Green Paper proposes that the European Public Prosecutor ‘should be appointed by the Council on a proposal from the Commission and with

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15 Radtke 2005, p. 111.
17 The Corpus Juris refers to the former article 223 of the Treaty European Community.
19 The Commission in its Paper divided its chapter 4 on the “Legal status and internal organisation of the EPP” in paragraph 4.1 “Status of the European Public Prosecutor” and paragraph 4.2 “Decentralised organisation of the European Prosecution Service”. Apart from wondering if a “decentralised organisation” is the same as “internal organisation”, I would prefer to explain first the
the [consent] of Parliament.’ This appointment procedure of the Prosecutor would, quoting the Commission, ‘ought to reflect the principles of *independence and legitimacy*’ and would ‘ensure the *total legitimacy* of the [Service].’ The Commission doesn’t elaborate on the meaning of “total legitimacy”. In its chapter on the legal basis, the Commission is of the opinion that an amendment of the Treaty (currently in the form of article 86 TFEU) is ‘the only way of giving the proposal [of establishing an EPPS] its *proper legitimacy*.’ Summarising this, the Commission finds that an amendment (the addition of the current article 86 TFEU) gives a *proper legitimacy* of establishing the Service; the appointment procedure of the Prosecutor ensures *total legitimacy* of the Service.\(^{20}\)

In my view the Commission mixed-up the principles of “legitimacy” and “independence”. In my view the legitimacy of the European Public Prosecutor is laying in the fact that the Prosecution Service can be established on the basis of a Treaty provision. This provision is added after discussion within a democratic legal order. The independence of the Prosecutor is necessary for the *proper functioning* of the Service. It would be really strange to say, and that is what the Commission does, that at the very moment of appointing the European Public Prosecutor, the Prosecution Service (of which the Prosecutor forms a part) would become “total” legitimate. Isn’t it so that without legitimacy of establishing the institution (EPPS) in the first place, the independence of the director of that institution (the EPP) could never be subject of discussion?

The Green Paper gave the appointment role to the Commission with the idea to stipulate the Commission as the institution responsible for protecting the Union’s financial interest.\(^{21}\) Does this also implies that the Commission must be the ultimate political responsible organ for the actions of the EPPS? The answer is to be seen further on in my thesis.

**I.3.1.2. TERM OF OFFICE**

In the *Corpus Juris* the Prosecutor is given a mandate of six years, which once could be renewed. The EPP may be dismissed by the European Court of Justice at the proposed internal organisation of the EPPS and second, with a complete and clear understanding of the body, examine the position of it within the EU.

\(^{20}\) COM(2001) 715 final, p. 27.

\(^{21}\) COM(2001) 715 final, p. 27.
request of the Parliament ‘if he no longer fulfils the conditions required for the performance of his duties or he is guilty of serious misconduct.’

The Green Paper guarantees the same appointment period. Only this term of office will be non-renewable, which would be a very strong safeguard of his independence. Nor the Corpus Juris nor the Green Paper elaborate on this point, though the Green Paper refers in footnote 71 to the nine years term of office of the prosecutor at the International Criminal Court.

What should be the ultimate independence guarantee with regard to the term of office? Should it be six years? Must it be renewable or non-renewable? Isn’t a “life-long” mandate the ultimate safeguard? When getting a mandate for life, the prosecutor has no reasons to act in its own behalf finding another profession. Even so, the Prosecutor will perform better, because when he no longer ‘fulfils the conditions required for the performance of his duties or if he is guilty of serious misconduct’ he must be dismissed.

To safeguard against political interference it’s up to the European Court of Justice, just like proposed in the Corpus, to decide on the dismissal of the EPP.

I.3.2. THE STATUS OF THE DEPUTY EUROPEAN PUBLIC PROSECUTORS

I.3.2.1. APPOINTMENT PROCEDURE

According to the Corpus Juris the nominations of the Deputy Prosecutors would be made by the European Parliament on proposal by the Member States.

The Deputy Prosecutors are accountable to the EPP whilst attached to the Service ‘in contrast to being accountable to the national prosecutor in the national hierarchy’. The Deputy Prosecutors must on the one hand be independent from the national prosecution service when looking at article 18(2) and on the other hand, must have a corresponding duty towards the EPP.

The principle of indivisibility makes that any act done by a DP would commit the whole Service.

Article 18(4) Corpus Juris

a) *indivisible* implies that any act undertaken by one of its members is taken as done by the [EPP]; that all acts which fall within the competence of the [EPPS] (particularly powers of investigation as set out under article 20) may be undertaken by any one of its members; and that, with the agreement of the [EPP], or in emergencies where he retrospectively approves, any of the [DP’s] may exercise his duties on the territory of any of the Member States, in collaboration with the offices of the [DP] in that Member State.

b) *interdependence* requires, on the part of the different [DP’s], an obligation to assist each other.\(^{25}\)

The *Corpus Juris* finds the solution of the “independence problem”, on-logically, in the article which obliges the independence itself. From my point of view this is a circular reasoning.\(^ {26}\)

Section 5 of article 18 of the *Corpus Juris* describes the following:

National Public Prosecutors (NPPs) are also under a duty to assist the [EPPS].\(^ {27}\)

The relation can be seen very clearly when considering the relation between the DP’s and the national prosecution services.

The Green Paper states that ‘the [EPP] would rely on Deputy Prosecutors in the Member States so as to secure the link between the EU mechanism and the national systems of justice. They would be appointed by the [EPP]. Candidates would be nominated by their Member State of origin from among national officials who conduct criminal prosecutions in the particular Member State and who can therefore claim relevant experience.’ The DP’s ‘could retain their national status in all respects regarding recruitment, appointment, advancement, remuneration, social protection, routine management, etc. Their hierarchical and disciplinary status would alone be affected for the duration of their term of office.’\(^ {28}\)

The Commission further says that ‘in any event [the DP’s] would be banned from receiving any instructions from their national authorities in any matter concerning the protection of the [EU’s] financial interest’. The proposal in the Green Paper leaves three options to the individual Member States in relation to the independence of their Deputy Prosecutor:

- exclude the DP from any other occupation;

\(^{25}\) Delmas-Marty & Vervaele 2000, p. 197.  
\(^{26}\) Delmas-Marty & Vervaele 2000, p. 319.  
\(^{27}\) Delmas-Marty & Vervaele 2000, p. 197.  
- make the DP a specialist in prosecuting crimes affecting the EU’s financial interest and let him continue prosecution of other, national, crimes;

- leave the choice between option 1 and 2 at national level.\textsuperscript{29}

I agree with Fijnaut and Groenhuijsen when they say that by placing the Deputy Prosecutors ‘under the authority of the [EPPS], they will be reduced to being outsiders at national level within their own [prosecution service]. And on top of that, they have no privileged relationship with the regular and/or national special police forces that will actually have to conduct investigations into Community fraud on the territory of the Member States.’\textsuperscript{30}

Coming back at the Green Paper options, with the \textit{Corpus Juris} and the above mentioned argument in mind it’s clear that for the functioning of a Deputy Prosecutor a tight link with the national systems and procedures is needed. It would be too difficult if each of the twenty-seven different Member State has the freedom to fill in the function of DP. Since a special Prosecution Service must be established to fight crimes affecting the EU’s financial interest\textsuperscript{31} I presume that the function of DP is a full-time job.

In my view the following provides the solution with regard to the independence of the Deputies. Member States must make a contract with the EPP which beholds the agreement that national prosecutor X is going to work for a certain period of time for the European Public Prosecution Service in the form of Deputy Prosecutor. During his employment he must have the same privileges as if he was still a national prosecutor. The responsibility for investigations and prosecutions comes for the EPPS. This will guarantee the independence (no special interest from an individual Member State).

\textbf{I.3.2.2. TERM OF OFFICE}

The DP’s have a mandate of six years, partly renewable every three years, according the \textit{Corpus}.\textsuperscript{32} Also the Commission proposes a renewable term of office ‘to take account of the pool available for recruitment in the Member States’.\textsuperscript{33} Because the

\begin{itemize}
  \item \textsuperscript{29} COM(2001) 715 final, p. 30.
  \item \textsuperscript{30} Fijnaut & Groenhuijsen 2002, p. 329.
  \item \textsuperscript{31} This is made clear in the next chapter.
  \item \textsuperscript{32} Delmas-Marty & Vervaele 2000, p. 315.
  \item \textsuperscript{33} COM(2001) 715 final, p. 29.
\end{itemize}
DP’s, hierarchically speaking, fall under the responsibility of the EPP, I see no problem to give them a renewable mandate.

1.3.3. STAFF

For the completeness of the thesis I briefly stipulate the staff as part of the internal organisation of the EPPS. Whereby the DP’s would have more staffs compared to the EPP, seen the ‘bulk of the human and material resources needed’. The staff of the EPP can be recruited, appointed and managed by himself, the DP’s staffs by the respective Member States in accordance with their national rules.34

1.3.4. THE POSITION OF THE EUROPEAN PUBLIC PROSECUTION SERVICE

As earlier mentioned, the Corpus Juris guarantees that the EPPS is ‘independent as regards both national authorities and Community institutions’.35 It refers to the national prosecution services that are accountable or dependent on their Ministry of Justice. To that regard the Corpus mentions the creation of a Prosecution Service Commission, which would be ‘composed of magistrates and external persons nominated by Parliament. This Commission would guarantee the independence of the EPP and could, if necessary, intervene in cases of dysfunction.’ However, it finds that the ECJ must be given the competences to rule on disputes and on ‘any disciplinary proceedings involving members of the [EPPS] and to impose adequate sanctions’. The authors of the Corpus reject the option of giving the Commission responsibility for disciplinary action.36

The Green Paper states independence as ‘an essential feature of the European Public [Prosecution Service]’. This is ‘warranted by the fact that the [EPPS] would be a specialised judicial body. He should be independent both of the parties to any dispute in the context of adversarial proceedings and of the Member States and the Community institutions and bodies.’37 Unfortunate, the Commission only explains the appointment and removal procedure of the European Prosecutor and is silent on the position of the Prosecution Service within the EU.38

37 COM(2001) 715 final, p. 27.
This positioning question is also asked by Zeman at the seventh Annual Conference of the ICLN on the future of European criminal law. Strijards asks himself the more concrete question if the EPPS will have ‘judicial status or will it become a kind of deconcentrated external department of the Commission’. He goes on by saying ‘if it will become a Commission department, the responsible Commissioner can give specific instructions per case. In that case [the European Public Prosecutor] is accountable to the Council for these instructions.’ However, if that would happen, the principle of independence is at stake. The Service must be free from political viewpoints.

The Corpus and the Green Paper proposes, as already mentioned, to let the ECJ decide on the dismissal of the EPP. This implies that the Commission has no intention to make the Service a department within its internal organisation (otherwise it would be logical for the Commission itself to take the dismissal decision). Fijnaut, Groenhuijsen and Strijards don’t offer options where to place the Service. Though the first two professors throw up the possibility that the EPP ‘would have to answer directly to the Parliament to some extent, since his office’s budget would be charged to the general budget of the [EU]’. The Commission proposes that ‘each Deputy Prosecutor would be remunerated by the Member State. But if there are extra operational costs for the Member States as a result of the European Public Prosecution Service, they could be charged to the [EPPS’s] budget’. In de Corpus there is no such proposal.

I find that, also in the light of the discussions on the independence of OLAF, that the EPPS must become a separate organ within the European Union without falling under a specific Union institution. The EPP, as head of the EPPS, can be asked to give explanation about his actions, on request of the Commission, Parliament or Council. The European Court is indeed the most appropriate institution to decide if the EPPS truly is not operating well.

Referring to the budgetary argument of Fijnaut and Groenhuijsen, I’m of the opinion that, if the EPPS’s budget would be charged to the general Union’s budget, the EPP can be asked by the Parliament to explain his expenditure of that budget, not about

42 See Chapter III.5.2.
43 See Chapter III.5.1.2. on the control of Eurojust.
the reasons behind certain investigations. In chapter III the accountability of Eurojust is discussed and compared with regard to the EPPS.

### 1.4. THE AREA OF FREEDOM, SECURITY AND JUSTICE

As my research question speaks about the ‘realisation of the area of freedom, security and justice’, it is necessary to examine this area.

#### 1.4.1. HISTORY

The Tampere Programme, adopted by the European Council in October 1999, was, according to Sorel, ‘a kind of “vision document” for the measures that had to be taken in order to create an area of freedom, security and justice in the European Union.’

In 2004 “The Hague Programme strengthening freedom, security and justice in the European Union”, and in 2005 the action plan based on that programme have been adopted. Strengthening refers to the Amsterdam Treaty where for the first time the term “area of freedom, security and justice” was used. The development of a closer cooperation in the area of Justice and Home Affairs was put earlier in the Maastricht Treaty. This Treaty sets out the areas in which the Member States find a common interest.

The preamble of the Treaty on the European Union states that the EU Member States

resolved to facilitate the free movement of persons, while ensuring the safety and security of their peoples, by establishing an area of freedom, security and justice, in accordance with the provisions of this Treaty and of the Treaty on the Functioning of the European Union.

#### 1.4.2. CURRENT PROVISIONS

Refers to the Amsterdam Treaty

Strengthening refers to the Amsterdam Treaty

The Maastricht Treaty, in turn, ‘drew much of its initial momentum from informal arrangement in the domain of justice and home affairs negotiated in the shadow of the earlier treaty framework’ and other separate legal frameworks. The common interests form the fundamentals of the AFSJ in the EU.

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44 Sorel 2006, p. 11.
45 Asylum; rules concerning the entrance of external borders; immigration policies and policies concerning third countries’ citizens; combating illicit drugs; fight against international fraud; judicial co-operation in civil matters; judicial co-operation in criminal matters; customs co-operation; police cooperation for preventing and fighting terrorism, drugs trade and other grave forms of international criminality, comprising, if necessary, certain aspects of customs cooperation.
Article 3 sub 2 ToEU states that the Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.

The “Area of Freedom, Security and Justice” also constitutes the heading of Title V TFEU. This title beholds five chapters about:

- general provisions;
- policies on border checks, asylum and immigration;
- judicial cooperation in civil matters;
- judicial cooperation in criminal matters;
- police cooperation.

The heading of the same title in the former Treaty was stated “Police and Judicial Cooperation”. Apparently it was necessary to create an area of freedom, security and justice by means of police and judicial cooperation. The current title is formulated as a goal (the creation of an AFSJ) and not as an instrument to reach that goal (police and judicial cooperation). By setting the AFSJ as a target, it has the effect of harmonisation. This harmonisation, on its turn, leads to a more effective fight against (serious) crime.

Article 67 TFEU, the opening article of the title, states that the Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member states.

The following articles under Title V provide for measures/instruments/legal acts etc. to work on the realization of the AFSJ as stated in the Treaty. Among those the possibility to establish an EPPS.

### I.4.3. FREEDOM, SECURITY AND JUSTICE

In his book on EU criminal law, Mitsilegas analyses the terms “freedom”, “security” and “justice”. According to him the categorisation in article 67 sub 2, 3 and 4 TFEU seems to link “freedom” with internal frontiers, immigration and asylum; “security” with criminal law; and “justice” with civil law.’ So, he acknowledges that only “security” is specifically linked to criminal law in article 67 sub 3 TFEU.47

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47 Mitsilegas 2009, p. 10.
I’m of the opinion that the terms are not linked to a specific category. I agree with De Zwaan and Bultena who say in their foreword\textsuperscript{48}, that ‘the term “freedom” refers to the fundamental thought of removing all obstacles in movements between the Member States. To guarantee such free movement (of persons) it is necessary to take common measures in, amongst others, fighting cross-border criminality. The term “security” beholds the offering of protection to persons within the area against criminality and providing refugees a safe haven. “Justice” is needed to actual make the (freedom) rights effective.’\textsuperscript{49}

According to Walker, the AFSJ ‘is a brand under whose name a significant volume of law – “hard” and “soft” – has already accumulated’.\textsuperscript{50} On the one hand I can agree with Walker that the AFSJ refers to a category which consist of a large number of law. On the other hand, the fact that such a “brand” is put in a legally binding text presumes, at least in my view, an obligation for the European Union. Using the words of Mitsilegas: ‘[this] implies a positive duty for the EU’. What does this duty beholds?\textsuperscript{51}

While comparing the relevant, earlier mentioned, sections of ToEU and TFEU, I noticed a difference in wording. The ToEU speaks about the creation of the AFSJ while the TFEU states that the Union shall constitute an AFSJ. In my view this English language version of the TFEU formulates the AFSJ as an ideal which must be established; the choice was made to use the words “shall constitute” instead of the single word “constitutes”. This wording used in the TFEU differs from the French\textsuperscript{52} and Dutch\textsuperscript{53} versions where the EU is an AFSJ. In the German\textsuperscript{54} language version article 67 TFEU speaks about the fact that the EU is creating an AFSJ. Though these translation differences are odd, in my view citizens can detain more rights from the

\textsuperscript{48} Though the book is referring to the Maastricht Treaty these fundamental principles have, at least in my view in this context, the same value.

\textsuperscript{49} De Zwaan & Bultena 2002.

\textsuperscript{50} Walker 2004, p. 3.

\textsuperscript{51} Mitsilegas 2009, p. 11.

\textsuperscript{52} Preamble: en établissant un espace; article 3 ToEU: offre un espace; article 67 TFEU: constitue un espace.

\textsuperscript{53} Preamble: door een ruimte; article 3 ToEU: biedt een ruimte; article 67 TFEU: is een ruimte.

\textsuperscript{54} Preamble: durch den Aufbau eines Raums ; article 3 ToEU: bietet einen Raum; article 67 TFEU: bildet einen Raum.
EU when the EU is (already) an AFSJ, then when the EU is developing such an area.\textsuperscript{55} According to Radtke ‘only an institution such as the public prosecutor’s office with its guardian role can ensure that these goals can be achieved.’\textsuperscript{56} Is it? In the conclusion I give my opinion on this radical viewpoint.

Despite the use of different words in diverse languages and the different meanings of the terms “freedom”, “security” and “justice”, it is clear that by the “area of freedom, security and justice” the European Union is meant.

\section*{II THE ADDED VALUE}

\subsection*{II.1. ORGANIZED CRIME}

According to Mitsilegas the \textit{Corpus Juris} serves as ‘a mini-criminal code for offences of fraud, market-rigging, money laundering, conspiracy, corruption, misappropriation of funds, abuse of office and disclosure of secrets pertaining to one’s office’.\textsuperscript{57} Though the authors of the \textit{Corpus} did created articles 1 to 8 to define several offences against the Union’s financial interests, they did not have had the intention to make such a “mini-criminal code”. Instead the \textit{Corpus Juris} is served to ‘offer a way forward for policy makers at national and European levels and for citizens’.\textsuperscript{58} What’s the idea behind this?

In its first chapter Delmas-Marty and the others mention that ‘eurofrauds have become a redoubtable challenge for investigative and prosecuting authorities, which continue to classify offences on the basis of fifteen distinct national orders’, because of the transnational and supranational elements of that frauds. Furthermore it stipulates that the challenge is ‘particularly apparent in relation to investigations within the institutions and organs of the Community and in the field of direct expenditure.’ Assimilation, horizontal and vertical cooperation had its limits, ‘leading to the need to harmonize and even unity certain definitions. Harmonization brings systems closer together whilst maintaining some differences.’ For the effectiveness of combating eurofrauds the unification of definitions of offences and basic procedural rules is necessary.\textsuperscript{59}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{55} It goes beyond the scope of this research to find out what those rights are and how this will turn out in the different Member States (seen the different language versions).
\item \textsuperscript{56} Radtke 2005, p. 112.
\item \textsuperscript{57} Mitsilegas 2009, p. 230.
\item \textsuperscript{58} Delmas-Marty & Vervaele 2000, p. 305.
\item \textsuperscript{59} Delmas-Marty & Vervaele 2000, p. 30.
\end{itemize}
\end{footnotesize}
In its Green Paper, the Commission elaborates on its wish to ‘stamp out’ crimes affecting the EU’s financial interests. The creation of the Prosecution Service will have the result that the presently unpunished criminals would be brought to justice.

The total financial impact of irregularities, including the suspected fraud in 2008, was estimated to account for a total expenditure of €783,200,000 and for a total of the own resources of €351,000,000. This is almost twice as much compared to the amount of fraud estimated in 1999. ‘Given its nature’, as the Commission points out, ‘the response must include a repressive dimension’. The Union must, in these circumstance, guarantee to especially the taxpaying citizens that the offenders will be prosecuted in the national courts. ‘Otherwise the credibility of European integration to public opinion could be seriously compromised.’

Is this credibility argument the reason the set up an EPPS?

The Commission in its Green Paper says, without giving any further indication, that ‘the protection of the Community’s financial interests is a specific enough concern to warrant a specific response transcending the limits of traditional judicial cooperation’. It further states that ‘none of the instruments currently in force or at proposal or negotiation stage give an adequate response to the specific question of criminal proceedings for acts to the detriment of the [EU’s] financial interests.’ This is still no clear answer on the question why specifically the EPPS is needed to prosecute crimes affecting the Union’s financial interests. Is the “traditional judicial cooperation” not good enough? Is this cooperation good enough for other cross-border criminal acts and not for financial-interest-crimes?

In their article about comments on the Green Paper Fijnaut and Groenhuijsen give two reasons why there is a need for ‘effective enforcement activities’: organized crime has been involved and ‘the cases concerned are primarily major and complex, involving the criminal courts of several Member States’.

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60 The financial interests of the EU see on the general budget, budgets administered by the EU or on their behalf and certain funds not covered by the budget and which are administered for their own account by EU bodies which do not have institutional status.
The Paper, by referring a few times to organised crime\textsuperscript{66}, implicitly gives this key reason. With this in mind I share the same opinion as the authors when they stated that this basic motive has no arguments on which it relies. So ‘the Commission is wrongly invoking the problem of organized crime to justify its proposal to establish [an EPPS]. The need for such far-reaching intervention in the relations between the Member States and the [EU]’ asks for proper arguments and does not satisfy with “current system failure” arguments and “complex cases” arguments.\textsuperscript{67}

Apart from the scale of the problem, what makes crimes affecting the EU’s financial interests special from other crimes? It’s in the name: it directly affects the \textit{European Union}. Is this the argument to set up the EPPS? I’m of the opinion, just like Fijnaut and Groenhuijsen, that this cannot be the argument. ‘Not only because the [EU] would thereby claim a privileged position for itself in criminal law enforcement activities within the EU, but also because it could then be postulated that other forms of organized crime should also be tackled in the same special way.’ To investigate and prosecute all other forms of organized crime would be out of proportion.\textsuperscript{68} This “privileged position” must not be read as putting the EU in front as “the most important”, but as the “most effective in combating crimes against the Union’s financial interests”.

To come in short, the Commission and the \textit{Corpus} academics obviously find the cooperation between the Member States and between Member States and the Union institutions not efficiently/effectively enough to fight the EU’s fraud cases. Whilst the responsibility for ensuring the protection of the financial interests rests on the Member States and the European Union institutions both.

### II.2. SINGLE PROSECUTION AREA

‘At the public hearings in Brussels, the magistrates stressed the great difficulties in bringing successful prosecutions of international, large-scale economic frauds, in a national context that is still dominated by the principle of territoriality of criminal law and criminal procedure.’\textsuperscript{69} Article 18(1) is written to overcome this problem.

\textsuperscript{67} Fijnaut & Groenhuijsen 2002, p. 326.
\textsuperscript{68} Fijnaut & Groenhuijsen 2002, p. 326.
\textsuperscript{69} Delmas-Marty & Vervaele 2000, p. 305.
For the purpose of investigation, prosecution, trial and execution of sentences concerning the offences set out above (articles 1 to 8), the territory of the Member States of the Union constitutes a single legal area.\textsuperscript{70}

Also the Commission stated in its communication of 29 September 2000 that the methods of cooperation between the Member States to fight EU fraud ‘often prove insufficient to overcome the difficulties faced by the judicial and police authorities’\textsuperscript{71}, because the shortcomings are duly related to the fact that police and judicial authorities are only allowed to act on their own territory. This creates delays, time-consuming actions and unpunished offences. These different procedures and rules can be set overboard by, according to the Commission as mentioned before, establishing the EPPS.\textsuperscript{72}

Both the authors of the \textit{Corpus Juris} and the Commission acknowledge in their texts that the “jurisdiction restriction” is the major problem in fighting the crimes against the European Union’s financial interests.

In short, jurisdiction can be defined as ‘the power of the legislature to apply the law to certain forms of conduct’. In his book Klip discusses the various jurisdictional principles\textsuperscript{73} which can be found in the EU. Important to take in consideration is that the Union approach of the doctrines is one that serves mostly the interests of the individual Member State. Also important is that ‘the principle of mutual recognition as stipulated both in \textit{ne bis in idem} rules and in forms of international cooperation may have an indirect effect of determining priority in cases of multiple jurisdiction.’ The Member State who is the first in starting criminal proceedings, prevents the others from exercising their jurisdiction.\textsuperscript{74}

The different national criminal law enforcement areas make it unnecessary complicated to fight serious attacks on shared, specifically Union interests. If the EU would become a common investigation and persecution area, the acts of the EPPS would have ‘the same value in all the Member States’. So, if a criminal act falls within the competence of the EPPS, the Prosecution Service has the power to take decisions in the case, instead of the separate involved Member States. I agree with the \textit{Corpus} and the Commission that this is the minimum condition for the Prosecution Service to be able to function.

\textsuperscript{70} Delmas-Marty & Vervaele 2000, p. 196.
\textsuperscript{72} COM(2001) 715 final, p. 23.
\textsuperscript{73} It goes beyond the scope of this thesis to elaborate on each and every principle separately.
\textsuperscript{74} Klip 2009, p. 187.
II.3. FINANCIAL INTERESTS OF THE EUROPEAN UNION

The offences defined in articles 1 to 8 of the Corpus Juris have no legal meaning within the EU. The Commission therefore gives four options to define criminal acts:

- referring to national law;
- harmonisation of part of national law to an extent to be determined with reference for the rest to the national rules;
- total harmonisation of certain national law;
- unification in a corpus of Union law.

The Green Paper acknowledges that the EPPS ‘will find it much easier to act if the substantive law is harmonised or unified’. However, will this be in proportion with the purpose of “stamping out” EU fraud? And how will Member States react on this unification?

‘The national legal orders will be all the less affected as the [EPP] will have to take account of each of [the national criminalised offences against the financial interests], depending on the Member State in which [the Public Prosecutor] acts.’ As the director of the Service, the EPP must be able to oversee the cases brought forward by the Deputy Prosecutors. To have a good sight, a proper binocular is not unnecessary. DP’s are already familiar with their “own” national legal order.

Currently article 86(1 and 2) TFEU refers to the Union’s financial interests.

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. The Council shall act unanimously after obtaining the consent of the European Parliament.

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, offences 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 offences.

Section 1 refers to crimes affecting the financial interests of the Union where the second paragraph states offences against the Union’s financial interests. Why did

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76 COM(2001) 715 final, p. 34.
the drafters used two different terms? In Dutch criminal law, for example, offences are less serious than crimes. However, looking at the article, there are no clues that they wanted to give different meaning to the words. When taking section 4 in consideration, it refers to paragraph 2 by speaking of “serious crimes”. Other language versions don’t even have the different usage of words.\textsuperscript{77}

The Convention on the protection of the European Communities’ financial interests of 26 July 1995 and its additional protocols signed in 1996 and 1997 are legislation into force. ‘They form the first important elements of a common base for the criminal law protection of the Union’s financial interests.’ The fact is, as brought up by the Commission in its proposal of 2001 for a directive of the European Parliament and of the Council on the criminal law protection of the Community’s financial interests, that ‘nearly six years after the convention was drawn up, the harmonisation objective has not been achieved and the whole area of the protection of Community financial interests continues to suffer from a lack of minimum standards of criminal law protection that can actually be applied throughout the European Union.’ This is due to the fact that not all the Member States have ratified the Convention and/or its protocols. The Commission was of the opinion that a proposal for a directive would have considerable support from the (fifteen) Member States bearing in mind that they all signed the convention and its protocols. In its proposal, the Commission already faced the option of putting in place, at a later stage, the EPPS. The directive still has the status of a proposal.

Seen the necessity of the common investigation and prosecution area, common definitions of offences are, at least in my view, the next essential step to take. The Green Paper gives three examples of offences (fraud, corruption and money-laundering) on which there is already substantial agreement between Member States. However, when the Paper was written, the Union accounted fifteen Member States instead of the current twenty-seven. The feasibility is envisaged in chapter V.

\textbf{II.4. OTHER CROSS-BORDER CRIMES}

Article 86(4) TFEU allows for the adoption of a decision amending the above mentioned sections 1 and 2.

The European Council may, at the same time or subsequently, adopt a decision amending paragraph 1 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 2.

\textsuperscript{77}The Dutch version speaks in both sections of “strafbare feiten”. The German version of “Straftaten”; the French of “infractions”.

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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.

The amendment of paragraph 1 sees on the extension of the powers of the EPPS to include serious crimes having a cross-border dimension. The paragraph 2 amendment regards to the perpetrators of, and accomplices in, serious crimes affecting more than one Member State. Klip only briefly brought up the difference in wording, without further examination. The following example explains that, in my view, a crime can have a cross-border dimension without affecting more than one state. A Frenchman in the United States of America prepares a terrorist act on France. The cross-border dimension lays in the fact that the EU citizen (the Frenchman) is physically staying in another state (the USA). The preparation sees only on France. So, a crime with a cross-border dimension which affects only one Member State. Why did the drafters used this formulation in the amendment section? In my view considering this example it would be strange if the EPPS, as a European Union body, would have the power to investigate, prosecute and bring to judgement the Frenchman, while the crime only sees on harming France. In casu it’s up to the specific Member State (France) to decide to prosecute or not. To actually investigate and prosecute it’s always necessary that the crime affects two or more Member States. So, I wonder why the EPPS should have powers for the cross-border dimension crimes as such. In my view the terminology in section 4 should be replaced by “crimes affecting two or more Member States”.

Apart from the examination above, isn’t this whole extension possibility somewhat ambiguously? The Corpus Juris only deals with the fraud crimes. Even the Commission explicitly speaks of ‘no extension of the European Public Prosecutor’s jurisdiction to offences beyond the scope of the protection of the Community’s financial interest’. Remarkably, in the Treaty establishing a Constitution for Europe the same extension possibility was provided.

I agree with Klip when he justly mentions that the decision to extend the EPPS’s powers ‘will not only have to further determine the concrete offences, but also have to deal with offences that are committed in conjunction with offences for which there is no jurisdiction for the [EPPS].’

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78 For this example I took terrorism as a serious crime.
80 Article III-274.
For the reason that the Union handles in his own interest, it is logic to give the EPPS the mandate to fight EU fraud crimes. It’s because of this European Union element that the EPPS shouldn’t be given the powers to fight other serious crimes.

III PROCEDURE

If the common investigation and prosecution area is realized and the crimes affecting the Union’s financial interest are defined, what should be the tasks of the European Public Prosecution Service? In this regard, secondary EU legislation is necessary. According to Radtke, the model of an EPPS needs European criminal procedure law in order to function properly.\(^8\) I’d rather avoid to speak in broad terms as “criminal procedure law” while only drafting the functioning of the EPPS in this legislation.

III.1. PREPARATORY STAGE

The *Corpus Juris* defines the preparatory stage in its article 25(1) as the period ‘from the initial investigations conducted by the EPP until the closure of such investigations and the decision to commit the case to trial’.\(^8\) The Green Paper doesn’t define this stage differently.\(^8\)

III.1.1. INFORMATION AND REFERRAL

Article 18(2) of the *Corpus Juris* first determines that the EPPS is responsible for *investigation and prosecution* concerning the offences defined in articles 1 to 8.\(^8\) Article 19 describes the seizing and opening of proceedings.

The EPP must be informed of all acts which could constitute one of the offences defined above (article 1 to 8), by national authorities (police, public prosecutors, juges d’instruction, agents of national administrations such as tax or customs authorities) or the competent Community body, the European Office for the Fight against Fraud (OLAF). It may also be informed by denunciation from any citizen or by a complaint from the Commission. National authorities must seize the European Prosecution Service at the latest when the suspect is

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\(^8\) Radtke 2005, p. 114, 115 and 116.
\(^8\) Delmas-Marty & Vervaele 2000, p. 203.
\(^8\) COM(2001) 715 final, p. 43 and 44.
\(^8\) Delmas-Marty & Vervaele 2000, p. 196.
formally “under investigation”, under article 29(1), or when coercive measures are employed, particularly arrest, searches and seizures or when a person’s telephone is to be tapped.

If an investigation conducted by a national authority reveals that one of the offences above has been committed (article 1 to 8), the file must be immediately submitted to the EPP.

However the EPP learns about the facts, it may become officially seized either by the national authorities or by acting on its own initiative.

The decision to prosecute, which means opening an investigation, may be taken by the EPP whatever the sum of the fraud involved. The EPP, bound by the legality principle, must bring a prosecution if it appears that one of the offences (articles 1 to 8) has been committed. It may however, by a decision with special grounds communicated immediately to the person who has informed it, or denounced it to its officials or laid a complaint:

- refer offences which are not serious or which affect principally national interests to the national authorities;
- drop the case, if the accused, having admitted guilt, has made amends for the damage caused and, as the case may be, returned funds received illegally;
- or grant an authorisation for settlement to a national authority which has applied for it, according to the conditions set out below (article 22(2b).

Furthermore article 20 defines the powers of investigation of the Public Prosecution Service and describes the separation of authority between the EPP and the Deputy Prosecutors.

In order to discover the truth and to bring the case to a point where it may be tried, the [EPPS] conducts investigations into the offences defined above (article 1 to 8) looking for evidence of innocence as well as evidence of guilt. Its powers are divided between the [EPP], the [DP’s] and, as may be, national authorities appointed for this purpose, according to the following rules.

The [EPP’s] own powers include:

- overseeing investigations and their delegation to one or more [DP’s], in accordance with the conditions and restrictions set out below (article 20(3));
- the coordination of investigations undertaken by the [DP’s] as well as by national police forces and competent national administrations and, as may be, OLAF; this coordination may take the form of oral or written recommendations to the relevant authorities;
- the right to call in cases where the investigation reveals that they concern in whole or in part offences defined above (articles 1 to 8).

All the following powers may either be exercised by the [EPP] or delegated to the [DP’s], where there is an investigation into offences set out in articles 1 to 8.
- questioning of the accused, under conditions which respect his rights as set out below (article 29);
- collection of documents and/or computer-held information necessary for the investigation and, if need be, visits to the scene of the offence;
- request addressed to the judge to order an expert enquiry under the conditions set out below (article 29);
- searches, seizures and telephone tapping ordered in accordance with the rule below (article 25bis) on authorisation from a judge or with his subsequent permission and undertaken with respect for the rights of the accused (article 32);
- hearings of witnesses who agree to cooperate with the law and, as may be, witnesses obliged to appear in accordance with the conditions below (article 32);
- notification of charges to the accused, with respect for the rights set out below (article 29);
- to make requests for a person’s remand in custody or judicial control.

The powers delegated to the [DP’s] can in turn be partially sub delegated, for a limited period and in respect of a particular matter, to a national authority (prosecuting authority, police or other competent authority, such as the tax authorities or customs). The national authority is obliged to follow the rules contained in the European Corpus Juris.

According to the Green Paper the European Public Prosecutor, would be ‘responsible for directing and coordinating investigation and prosecution activities for all offences within his jurisdiction throughout the common territory defined for the purpose.’ The Deputy Prosecutors, would be integrated into the national justice systems and would actually bring offences to trial.\(^{86}\)

‘Cases could be referred to the [EPP] by the relevant national or EU authorities.\(^{87}\) The Prosecutor can also act out of his own motion on the basis of the information in his possession.\(^{88}\)’ Just like article 20(2a) of the Corpus describes, according to the Commission it must be the task of the EPP to oversee the incoming information and take conclusions out of that information. ‘National enforcement authorities don’t have the broad, Community-wide view of the cases they handle.’ As the Commission further explains it is the philosophy of the proposal that ‘specifically Community interests should be matched by a European enforcement function in relation to perpetrators of offences against them.’\(^{89}\)

\(^{86}\) COM(2001) 715 final, p. 28.
\(^{87}\) Article 19(1) Corpus Juris is more detailed on this stage.
\(^{88}\) Article 19(3) Corpus Juris describes the same.
In the EU there are two principles that determine to prosecute or not: the legality principle and the opportunity principle. As Klip confirms, in the law systems that apply the legality principle prosecution is the rule, non-prosecution is the exception. All offences that come to the attention of the police or the prosecution must in principle be prosecuted. The opportunity principle says that the state may ‘refrain from initiating a prosecution when the general interest requires it to do so.’ According to him the two systems in practice don’t really differ. Additionally both systems provide for a correction mechanism, namely that a decision not to prosecute can be challenged before court. Despite these two systems don’t differ so much in practice, the choice of a Member State for a specific principle says so much about its tradition. In my view this tradition plays a very important role for Member States in deciding to accept the establishment of the EPPS.\textsuperscript{90}

The \textit{Corpus Juris} says the following in article 21.

When he considers investigations to be completed, \textit{the [DP] decides}, under the authority of the [EPP], whether to make a decision not to prosecute, or to bring the case to court.

The decision not to prosecute is notified to the European Commission, to the accused and to any body or person who informed the EPP, denounced the offence to its officials or laid a complaint, within the meaning defined above (article 19(1)).

The decision to bring the case to court is notified under the same conditions as non-prosecution (article 21(2)). ...

According to the Green Paper, the EPP would ‘initiate enquiries only if the known facts might constitute a Community offence within the prosecutor’s jurisdiction, or at least give reason for suspecting that such an offence had been committed.’\textsuperscript{91} But has the EPP, or have the DP’s, a duty to prosecute or the discretion not to?

The Green Paper states very clearly that the Prosecutor should have the duty to prosecute, so a mandatory prosecution system is required. The \textit{Corpus Juris} only obliges the DP’s in its article 21(1) to make a decision and doesn’t say anything on the duty to prosecute. (For some non argued reason the Paper doesn’t refers to the Deputy Prosecutors; apparently the Commission wants to give this power to the Prosecutor only.) The Commission argues that the mandatory system is needed seen in the light of a uniform proceeding throughout the whole Union and to warrant the EPPS’ independence. It further brings up the differences between the two systems.

\textsuperscript{90} Klip 2009, p. 250.
\textsuperscript{91} COM(2001) 715 final, p. 45.
‘Where prosecution is discretionary the prosecutor has to state reasons for a decision to close a case without further action, and such decisions can be challenged. And where prosecution is mandatory the requirement is rendered more flexible by allowing a variety of cases to be closed subject to stated conditions.’ In case of having the latter system, there is the possibility to close a case on technical grounds and on the following discretionary grounds:

- to avoid overloading the EPPS;
- to avoid a further investigation when this would not be in proportion to the charges against the accused;
- to stimulate the effectiveness of recovery of sums corresponding to the offences against the EU’s financial interest.92

With regard to the third point, article 19(4c) Corpus Juris describes that this can even be a reason to drop the case. The question of Klip on whether or not out-of-court settlement should exist, can thus be answered positively.93

Currently, article 86(2) TFEU determines first, just like article 18(2) Corpus Juris, that the Prosecution Service shall be responsible for investigating and prosecuting the perpetrators of, and accomplices in, offences against the Union’s financial interests.

I agree with the Commission that there must be a uniform procedure which has the basic rule to prosecute and provides clear exceptions to that rule. With a system “prosecute, except...” the role of the Service would be more transparent than when leaving the choice (prosecute or not) to the discretionary power. Seen the main task of the EPP in overseeing the whole load of cases, it would be logic, at least from my point of view, to leave the test of the exceptions to the EPP and not to the DP’s as the Corpus proposes.

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III.2. PRE-TRIAL JUDGE

The Corpus authors find that the sole establishment of the EPPS would probably not be ‘enough to ensure the full observance of the principle of judicial control, which presupposes a control exercised by a judge acting as an independent and impartial arbiter between defence and prosecution’.94

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93 Klip 2009, 412.
94 Delmas-Marty & Vervaele 2000, p. 50.
Throughout the preparatory stage, and independent and impartial “judge of freedoms”, designated by each Member State within the jurisdiction sitting where the [EPP] is established, exercises judicial control. This judge is also competent to order an expert opinion. He may also order measures to conserve the subject matter of the prosecution, in cases where the duty to repay appears to be beyond dispute and such measures are necessary for the preservation of civil interests and are proportionate. The judge of freedoms applies national law as well as the *Corpus Juris.*

It is clearly mentioned that there should be ‘no overlap between the role of the judge of freedoms and that of the trial judge. To envisage the creation of a pre-trial chamber ‘was not within the brief of the study group’. In the view of the Commission ‘this solution would effectively generate an obligation to enact a full body of common European legislation governing investigations, applying to searches, seizures, interceptions of communications, subpoenas, arrest, judicial review, preventive custody, etc.’ Therefore it finds that the judge of freedoms could be put in the national systems. ‘From a functional point of view, the competent court would be the court of the Member State to which the relevant Deputy European Public Prosecutor belongs. Several national courts may therefore be involved in the same case.’ The Commission has a preference for the option that the EPP could apply to one judge of freedoms (in one Member State) ‘who would issue or authorise all the acts needed for the investigation, executable throughout the Communities on the basis of the mutual recognition principle.’ This alone corresponds to ‘the principle of establishing a common investigation and prosecution area’. Contrary to what the *Corpus Juris* didn’t, the Green Paper proposed the creation of a national designated Pre-Trial Chamber to decide on the forum choice and the adequacy of the evidence.

Nor in article 86 nor in other articles of the TFEU the judge of freedoms or the Pre-Trial Chamber is mentioned. Is it possible to set up such institutions through secondary legislation? Is it even necessary to have such a pre-trial chamber?

In my view another institution to rule on the actions done in the preparatory stage is unnecessary. The ECJ must be competent to rule on certain disputes in this stage. The trial chamber eventually decides on the fairness of the procedure and the feasible sanction. A member of the defence unit, as I discuss in one of the next

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95 Delmas-Marty & Vervaele 2000, p. 204.
96 Delmas-Marty & Vervaele 2000, p. 89 and 90.
subparagraphs, is the appropriate person during the whole prosecution stage to elaborate on misconducts.

### III.2.1. ARREST WARRANT

Both the *Corpus* and the Paper discuss the fact that the (national) judge of freedoms should have the power to issue an arrest warrant.\(^{98}\) Currently the Council Framework Decision on the European arrest warrant provides for the extradition system.\(^{99}\) ‘The Tampere European Council of 15 and 16 October 1999 called on Member States to make the principle of mutual recognition the cornerstone of a true European law enforcement area. The European arrest warrant proposed by the Commission is designed to replace the [former] extradition system by requiring each national executing judicial authority to recognize, and with a minimum of formalities, requests for the surrender of a person made by the judicial authority of another Member State (the issuing judicial authority).’\(^{100}\)

*Article 1(1) and (2) European arrest warrant*

1. The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

2. Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.

### III.2.2. EVIDENCE

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Just like it’s the case with the European arrest warrant, the European evidence warrant\textsuperscript{101} is entered into force after the *Corpus Juris* and the Green Paper were written.

Radtke, who also putted his opinion on paper before the evidence warrant entered into force, found that the proposed Prosecution model was based on ‘a false premise, namely the acceptance of a free transfer of evidence within Europe.’ He was of the opinion that the principle of mutual recognition was not applicable to all criminal procedural processes. The principle didn’t hold ‘concerning the procedure of taking and using evidence at different stages of a criminal case’. This was due to the fact that ‘there was no evidence which could be gathered in one Member State and could be made object of a judgment in another Member State without considering the rules of evidence existing in that state.’\textsuperscript{102}

The current article 1(1) of the Framework Decision defines the evidence warrant

The EEW shall be a judicial decision issued by a competent authority of a Member State with a view to obtaining objects, documents and data from another Member State for use in proceedings referred to in Article 5.

*Article 5 European evidence warrant*

The EEW may be issued:

(a) with respect to *criminal* proceedings brought by, or to be brought before, a judicial authority in respect of a criminal offence under the national law of the issuing State;

(b) in proceedings brought by *administrative* authorities in respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction in particular in *criminal* matters;

(c) in proceedings brought by judicial authorities in respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law, and where the decision may give rise to further proceedings before a court having jurisdiction in particular in *criminal* matters; and

(d) in connection with proceedings referred to in points (a), (b) and (c) which relate to offences or infringements for which a legal person may be held liable or punished in the issuing State.

\textsuperscript{102} Radtke 2005, p. 114, 115 and 116.
Apart from the fact that it goes beyond this thesis to examine the complete warrant, it is even impossible to measure the effect of these rules. The transposition period will end on 19 January 2011. To know the existence of such an instrument is the most relevant in this context.

### III.2.3. DEFENCE

Paying attention to the rights of the “defence” it’s important to consider who or what exactly is the defence.

#### III.2.3.1. OFFENDER/SUSPECT

In the section on the criminal liability, the *Corpus Juris* speaks in article 11 over the “offender”, “inciter” and “accomplice”. The offender commits the offences by himself; the inciter knowingly provokes a natural or legal person to commit the criminal act; the accomplice knowingly helps committing an offence.\(^{103}\)

The above mentioned categories define the persons who in reality committed (or attempted to commit, see article 11bis) the crime against the EU’s financial interests. In the ideal situation, the offender is the same person as of whom the EPPS has reasons to believe that he committed certain criminal offences. So, in the perfect circumstances the suspect is the same as the offender. Because the whole criminal law system sees on finding the “criminal law truth”, presumption of innocence is, regarding the suspect, the leading principle. Strangely, the *Corpus* doesn’t provide for a “suspect definition”.

The Green Paper does speak of a suspect, but, just like the *Corpus*, didn’t define him. It does state that ‘there should also be provision for [legal persons] to be liable where defective supervision or management by such a person made it possible for a [natural] person under his authority to commit the offences on behalf of the legal person. Liability of a legal person does not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories in the offences.’\(^{104}\)

I’m of the opinion that a common definition of a suspect (for financial crimes) would contribute to the effectiveness of the prosecution. Though, a definition of an accused would be more important.

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\(^{103}\) Delmas-Marty & Vervaele 2000, p. 192.

III.2.3.2. ACCUSED

Like it is the case with the suspect, the accused is not defined in the *Corpus*. In article 29 though, the rights of the accused are brought up. Among those rights, the right to be informed of his right to remain silence and from the time of his first questioning the right to know the content of the charges against him.\(^\text{105}\)

According to the Green Paper, the accused is a person ‘who is suspected of an offence and who has been notified by the EPPS of the charges against him’. The Green Paper gives this specific definition in a footnote and is also mentioning that the concept of accused person may ‘correspond to various forms of status depending on the legal terminology in the different Member States’.\(^\text{106}\)

A common definition in this regard is in my view necessary when the EPPS would be established.

III.2.3.3. LEGAL REPRESENTATION

A lawyer can act as a legal representative of the suspect/accused in the process.\(^\text{107}\)

In the light of the European dimension of the criminal act, for the accused it can be very uncertain which court would be competent. When for example a Dutch accused is in pre-trial custody in Germany, he or she would be better off with a Dutch speaking German lawyer. If the actual trial will take place in Italy, the lawyer must be aware of the Italian criminal proceedings. The accused is in that regard better of with a Dutch speaking Italian lawyer. Has an accused also the right to a legal interpreter during the preparatory stage? Or only for the Trial stage? A Defence Unit, which provides lawyers who are familiar with the EPPS’s processes, could provide the solution. Nor by the *Corpus* nor by the Commission this kind of Unit is proposed.

III.2.3.4. NE BIS IN IDEM

‘The European Public Prosecutor should not be able to open proceedings against a person who has already been acquitted or convicted by a final judgment of a criminal court for the same offence.’ The EPP must be certain it’s the same offence and the same suspect. For this situation the judge of freedoms or the Pre-Trial Chamber would have been the proper institutions. I’m of the opinion, now that such

Institutions are currently not in the pipeline and, as I conclude earlier, they are unnecessary, the defence should be able to appeal against the decision to prosecute. In case an offence is dropped at national level for lack of evidence, the prosecutor may, of course, take up the case where the national authority left it.\textsuperscript{108}

If the EPP decides not to prosecute he would send the case to the national authorities ‘leaving it to them to decide whether such a case is of interest at national level’. When the suspect is already notified of the offences he might have committed, the \textit{ne bis in idem} principle could be at stake here.\textsuperscript{109}

\section*{III.3. TRIAL STAGE}

\subsection*{III.3.1. JUDGE AT FIRST INSTANCE}

\textit{Article 18(2) Corpus Juris} states that the EPPs is responsible for committal to trial and presenting the prosecution case at trial.\textsuperscript{110} Article 22 elaborates on bringing and terminating a prosecution.

For the offences set out above (article 1 to 8), the EPP prosecutes at the court of trial (selected as indicated hereafter, article 26), according to the laws in the relevant state. The national prosecutor may if appropriate join the proceedings, if national interests are also under threat. In such a case, notices and summons are also addressed to the national prosecutor and the file is sent out to him in good time.

\textit{Article 26} examines the competent court.

The offences set out above (article 1 to 8), are tried by national, independent and impartial \textit{courts}, appointed by each Member State according to the rules on competence of the national law. The courts must as far as possible consist of \textit{professional judges}, specializing wherever possible in economic and financial matters.

Each case is judged in the Member State which seems appropriate in the interests of efficient administration of justice, any conflict of jurisdiction being settled according to the rules set out hereafter (article 28). The principal criteria for the choice of jurisdiction are as follows:

- the State where the \textit{greater part of the evidence} is found;
- the State of \textit{residence or of nationality of the accused} (or the principal persons accused);
- the State where the economic impact of the offence is the greatest.

\textsuperscript{108} COM(2001) 715 final, p. 45.
\textsuperscript{110} Delmas-Marty & Vervaele 2000, p. 196.
In application of the general rule on the complementarity of national law (article 35), national courts must refer to the rules in the European Corpus and, whenever needed, those of national law. They are bound in all cases to give grounds for the penalty by reference to circumstances pertaining to the particular case, applying the rules set out above (articles 14 to 17).

The use of professional judges (article 26(1)) is criticized by Member States who prefer the use of juries (such as Ireland, the United Kingdom and Sweden).\(^{111}\) ‘The choice of the Member State where the case is to be tried is made by the EPP, who first consults with the [DP’s] or the national prosecution services who carried out the investigation.’\(^{112}\)

The novelty about the proposal, as brought up by the Green Paper, is that the investigation and prosecution would be placed in the hands of a Union body while the trial stage would remain entirely in national hands. The reason of to do so, lays in the fact that the Commission tried to create a ‘supplementary mechanism that would be in a harmonious relationship with national criminal justice systems’.\(^{113}\) To avoid the risk of jurisdiction conflicts, the Commission proposes to give the EPP the power to choose the competent court in a single Member State. ‘Since that choice determines not only the language(s) that will be used, the practicalities (witnesses, transport etc.) and the court that has jurisdiction but also the applicable national law in matters not within the common set of rules.’ Therefore the Paper provides for some criteria, which correspond with those brought up in the \textit{Corpus Juris}.

Article 86(2) TFEU provides in his second sentence that the EPPS

\begin{quote}
shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences.
\end{quote}

According to Klip, this article means that the Prosecutor ‘not only decides upon which cases will be brought to a national criminal court, but also in which Member State they will take place. This requires full knowledge of the jurisdictional rules of the various Member States or to accept the risk of having to face a finding of incompetence by a national court that does not have jurisdiction.’\(^{114}\)

Purely looking at the offences, bearing in mind the harmonisation of certain legislation and the principle of mutual recognition, I’m of the opinion that it shouldn’t matter where to trial a case. It must be the above mentioned practicalities...

\footnotesize
\(^{111}\) Delmas-Marty & Vervaele 2000, p. 94.
\(^{112}\) Delmas-Marty & Vervaele 2000, p. 207.
\(^{114}\) Klip 2009, p. 412.
that should prevail in the choice of the competent court. Therefore the criteria in article 26 *Corpus Juris* should be reordered. Apart from this discussion and besides the current article 86(2) TFEU refers to national courts, I wonder if it wouldn’t be easier for the EPPS if one European Criminal Court would be established. Besides the humongous costs of the creation and functioning of such an ECC with regard to the damage of the fraud crimes, there are already national courts. The principles of proportionality and subsidiarity are at steak. Also, in my view, a European Criminal Court takes the Union’s financial crimes too far away from the national responsibility.

### III.3.2. APPEAL

The *Corpus Juris* states that a convicted person must be subject to appeal. A higher court of the Member State where the conviction was pronounced at first instance is competent. In case of total or partial acquittal, appeal is also open to the EPP. In case of preliminary questions and on conflicts of jurisdiction, the ECJ is competent. The Green Paper corresponds with this proposal.

### III.4. EXECUTION STAGE

Article 23 sets out the role of the Prosecution Service in the execution of sentences.

1. When a conviction becomes definitive, it is immediately communicated by the EPP[S] to the authorities of the Member State appointed as the place of execution of the decision; certain penalties such as confiscation, removal of rights or publication of the conviction may be carried out in one or more places other than the place of imprisonment. The EPP[S] is responsible, alongside the competent national authority, for ordering and overseeing the implementation of the sentence if this is not automatic. In principle, execution of the penalties is governed by the laws in force in the Member State appointed as place of execution of the sentence. However, the EPP oversees the application of the following common rules across the whole territory of the States of the European Union:

   a. any period spent in custody by the accused on account of the same acts, in any State and at any point of the procedure, is deducted from the custodial sentence pronounced by the court of judgment;

   b. no person may be prosecuted or criminally convicted in a Member State by reason of one of the offences defined above (article 1 to 8) for which he has

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115 Delmas-Marty & Vervaele 2000, p. 207.
already been either acquitted, or convicted by a final judgment, in any of the Member States of the European Union.

2. The EPP[S] may, if there are grounds, authorise a transfer if a convicted person with custodial sentence asks to be imprisoned in a Member State other than the one named by the conviction.\footnote{Delmas-Marty & Vervaele 2000, p. 202.}

According to section 1, both the Service and the competent national authority are responsible for ordering and overseeing the implementation of the sentences. From my point of view, the \textit{ne bis in idem} principle mentioned in subparagraph b doesn’t belong there. It must be up to the EPPS in the preparatory stage and up to the national court in the trial stage to oversee this.

The Commission ‘does not envisage giving the [Prosecution Service] a role to play in the execution of the judgement given on the merits. The reference to national law on this point should be facilitated by the progress made since Tampere.’\footnote{COM(2001) 715 final, p. 60.}

In line with the Commission’s opinion, at this time article 86 TFEU doesn’t mention the execution phase as a role to play for the European Prosecution Service. Klip concludes that ‘since all other instances of the criminal proceedings are covered [in article 86 TFEU], it must be drawn from this that no role is provided for the [EPPS] in the execution of the sentences imposed by national criminal courts.’\footnote{Klip 2009, p. 412 and 413.}

So, after conviction by the national judge, on request of the Prosecutor, it’s up to the national public prosecution service to execute the sentence. What should be the role of the EPPS when complaints about for example prison conditions are being made? Isn’t it one of the core businesses of prosecution services in general to execute the requested sentences themselves? Why not creating an EU Execution Service? Or even an European Prison?

Using the same reasoning for the European Prison as for the ECC, creating such a prison would be out of proportion. Convicted persons can be well tagged in national prisons by the Deputy Prosecutors. This suggests my opinion on the execution stage. This must form a part of the EPPS.

\section*{III.5. RELATIONSHIP WITH OTHER BODIES}

\subsection*{III.5.1. EUROJUST}

\footnotesize
\begin{itemize}
\item 118 COM(2001) 715 final, p. 60.
\item 119 Klip 2009, p. 412 and 413.
\end{itemize}
As Strijards gives critical reflexions on the European Public Prosecution Service in his article, he mentions the importance to point out that article 86 TFEU refers to the link with Eurojust.\footnote{Strijards 2008, p. 19.}

\textit{Article 86(1) TFEU}

\begin{quote}
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 \textit{from Eurojust}. The Council shall act unanimously after obtaining the consent of the European Parliament.
\end{quote}

The article implies that the Council may establish a European Public Prosecutor’s Office \textit{from Eurojust}.\footnote{The wording used in the German (\textit{ausgehend von}) and French (\textit{à partir d’}) Treaties have the same meaning as the English version. In Dutch \textit{op basis van} (\textit{on the basis of}) differs from the other language versions mentioned.} Why setting up the EPPS from Eurojust? What does this “from” exactly compel? Before answering this and other related questions, I start this paragraph by examining the current institution Eurojust.

\section*{III.5.1.1 BACKGROUND}

‘The establishment of Europol was coupled with calls to apply this model of promoting European integration in the sphere of police cooperation in the EU via an agency to the field of judicial cooperation in criminal matters. The first major attempt to coordinate EU action in the field took place by the adoption in 1998 of a Joint Action establishing the European Judicial Network.’ As Mitsilegas stipulates, this Network was far from being a centralized European body. On 16 December 2008 Council Decision 2008/976/JHA repealed the Joint Action. Article 3 describes its manner of operation.\footnote{Mitsilegas 2009, p. 187 and 188.}

The European Judicial Network shall operate in particular in the following three ways:

- it shall facilitate the establishment of appropriate contacts between the contact points in the various Member States in order to carry out the functions laid down in Article 4;

- it shall organise periodic meetings of the Member States representatives in accordance with the procedures laid down in Articles 5 and 6;
Article 4 sets out the functions of the contact points mentioned in article 3(a).

The contact points shall be active intermediaries with the task of facilitating judicial cooperation between Member States, particularly in actions to combat forms of serious crime. They shall be available to enable local judicial authorities and other competent authorities in their own Member State, contact points in the other Member States and local judicial and other competent authorities in the other Member States to establish the most appropriate direct contacts. They may if necessary travel to meet other Member States contact points, on the basis of an agreement between the administrations concerned.

The contact points shall provide the local judicial authorities in their own Member State, the contact points in the other Member States and the local judicial authorities in the other Member States with the legal and practical information necessary to enable them to prepare an effective request for judicial cooperation or to improve judicial cooperation in general.

At their respective level the contact points shall be involved in and promote the organization of training sessions on judicial cooperation for the benefit of the competent authorities of their Member State, where appropriate in cooperation with the European Judicial Training Network.

The national correspondent, in addition to his tasks as a contact point referred to in paragraphs 1 to 3, shall in particular:

- be responsible, in his Member State, for issues related to the internal functioning of the Network, including the coordination of requests for information and replies issued by the competent national authorities;

- be the main person responsible for the contacts with the Secretariat of the European Judicial Network including the participation in the meetings referred to in Article 6;

- where requested, give an opinion concerning the appointment of new contact points.

The European Judicial Network tool correspondent, who may also be a contact point referred to in paragraphs 1 to 4, shall ensure that the information related to his Member State and referred to in Article 7 is provided and updated in accordance with Article 8.

‘The idea of the creation of an EU-wide body still remained. The development of Eurojust must be viewed in the context of the ongoing debate regarding the nature and extent’ of the Union’s integration in criminal matters. There were two main thoughts on this. On the one hand there was the Corpus Juris project and on the other hand there was a number of Member States ‘putting forward alternatives [to

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123 Mitsilegas 2009, p. 188
the *Corpus Juris*] to harmonization in criminal law, in particular mutual recognition. Eurojust seemed to have won this “battle” at EU constitutional level’, because the Nice Treaty included article 31 on Eurojust and nothing on the EPPS. As I already stated above, this is changed since the Treaty of Lisbon entered into force.

### III.5.1.2. DECISIONS

The Council adopted a Decision establishing a Provisional Judicial Cooperation Unit. Also called Pro-Eurojust. ‘According to the Pro-Eurojust Decision, the objectives were to improve cooperation and stimulate coordination between national authorities with regard to the investigation and prosecution of serious crime.’

The attacks of 9/11 showed that terrorism was not limited to the national or regional sphere and that the fight against it must be coordinated in the widest international perspective. Eurojust was established in 2002. As a follow-up in July 2008 the New Council Decision on the strengthening of Eurojust followed.

Article 2(1) of this decision states its composition.

> Eurojust shall have one national member seconded by each Member State in accordance with its legal system, who is a *prosecutor, judge* or *police officer* of equivalent competence.

Article 3(1) sets out the objectives.

1. In the context of investigations and prosecutions, concerning two or more Member States, of criminal behaviour referred to in Article 4 in relation to serious crime, particularly when it is organised, the objectives of Eurojust shall be:

   a. to *stimulate and improve the coordination*, between the competent authorities of the Member States, of investigations and prosecutions in the Member States, taking into account any request emanating from a competent authority of a Member State and any information provided by any body competent by virtue of provisions adopted within the framework of the Treaties;

   b. to *improve cooperation* between the competent authorities of the Member States, in particular by facilitating the execution of requests for, and decisions on, judicial cooperation, including regarding instruments giving effects to the principle of mutual recognition;

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125 Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime.
126 Council decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime.
c. to support otherwise the competent authorities of the Member States in order to render their investigations and prosecutions more effective.

As Van den Wyngaert summarizes, Eurojust ‘is serving the purpose of improving intergovernmental cooperation.’

As determined by article 4, the types of crime which fall under Eurojust’s mandate are the same as the crimes set out in the Annex of the Europol decision. Also other offences committed in conjunction with these crimes.

Article 9a(2) of the Eurojust Decision determines that

> each Member State shall define the nature and extent of the powers it grants its national member as regards judicial cooperation in respect of that Member State. However, each Member State shall grant its national member at least the powers described in Article 9b and, subject to Article 9e, the powers described in Articles 9c and 9d, which would be available to him as a judge, prosecutor or police officer, whichever is applicable, at national level.

‘This determination of the powers of Eurojust national members by reference to the domestic law of their state of origin has resulted in considerable discrepancies with regard to the way in which Member States have actually defined these powers.’

This was one of three main areas of action during the Lisbon Seminar on the improvement of Eurojust. The other two behold improvement of the exchange of information between the National Members and their national authorities and fine-tuning the relationship between Eurojust’s national correspondents and the contact points of the European Judicial Network.

The current article 85 TFEU explains that

> Eurojust’s mission shall be to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases, on the basis of operations conducted and information supplied by the Member States’ authorities and by Europol.

In this context, the European Parliament and the Council, by means of regulations adopted in accordance with the ordinary legislative procedure, shall determine Eurojust’s structure, operation, field of action and tasks. These tasks may include:

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- the initiation of criminal investigations, as well as proposing the initiation of prosecutions conducted by competent national authorities, particularly those relating to offences against the financial interests of the Union;
- the coordination of investigations and prosecutions;
- the strengthening of judicial cooperation, including by resolution of conflicts of jurisdiction and by close cooperation with the European Judicial Network.

According to Van den Wyngaert ‘the success of Eurojust will depend on the powers that its members actually receive from the Member States. It will have no autonomous powers of investigation, nor is there an obligation on Member States or EU institutions to communicate information to Eurojust.’ Article 9a(2) of the Consolidated version of the Eurojust Decision still says that each Member State shall define the nature and extent of the powers it grants its national member as regards judicial cooperation in respect of that Member State.

Article 32 of the new Decision explains the Parliamentary and Council involvement.

1. The President, on behalf of the College, shall report to the Council in writing every year on the activities and management, including budgetary management, of Eurojust. To that end, the College shall prepare an annual report on the activities of Eurojust and on any criminal policy problems within the Union highlighted as a result of Eurojust’s activities. In that report, Eurojust may also make proposals for the improvement of judicial cooperation in criminal matters. The President shall also submit any report or any other information on the operation of Eurojust which may be required of him by the Council.

2. Each year the Presidency of the Council shall forward a report to the European Parliament on the work carried out by Eurojust and on the activities of the Joint Supervisory Body.

Article 11 determines that the Commission shall be fully associated with the work of Eurojust and so give opinions for the attention of the Council.

III.5.1.3. COOPERATION WITH OTHER BODIES

III.5.1.3.1. EJN

The difference between the European Judicial Network and Eurojust is that Eurojust works on an independent EU-wide basis, while the Network operates within a national context, limited to bilateral cooperation. As set out above, article 85 TFEU also explicitly names the Network as an important partner of Eurojust. Seen the fact that both institutions have the goal of improving the judicial cooperation, it isn’t strange to see this clear reference in the article. Article 25a Eurojust Decision further examines the cooperation between this two bodies.
III.5.1.3.2. OLAF

As I examine in the next paragraph, OLAF has a very important role regarding the fight of offences against the Union’s financial interests. Though article 85 TFEU speaks of ‘particularly those relating to offences against the financial interests of the Union’, OLAF isn’t mentioned here (contrary to the EJN). During the establishment of Eurojust there were issues raised of the relationship and potential overlap with OLAF. Article 26(1) points out that

Eurojust shall establish and maintain cooperative relations with at least:

- Europol;
- OLAF;
- the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex);
- the Council, in particular its Joint Situation Centre.

Eurojust shall also establish and maintain cooperative relations with the European Judicial Training Network.

OLAF may contribute to Eurojust’s work to coordinate investigations and prosecution procedures regarding the protection of the financial interests of the European Communities, either on the initiative of Eurojust or at the request of OLAF where the competent national authorities concerned do not oppose such participation.

By explicitly bringing up the fight against fraud crimes in the EU in article 85 TFEU, the importance of the relationship between Eurojust and OLAF seems obvious. What I don’t understand is why OLAF, contrary to the EJN, isn’t put in this Treaty provision. The feeling is being created that cooperation with OLAF is less important than with the Judicial Network. I guess this has to deal with the fact that OLAF falls under the Commission.

III.5.3.1.3. EUROPOL

‘The relationship between Eurojust and Europol appears to be closer than that between Eurojust and OLAF. Intensified cooperation between Europol and Eurojust may serve to boost the chances for the investigation and prosecution of crime,’\textsuperscript{129} On 1 January of this year the Eurojust-Europol Agreement entered into force. Article 4 defines its purpose.

\textsuperscript{129} Mitsilegas 2009, p. 100 and 101.
The purpose of this Agreement is to establish and maintain close cooperation between the Parties in order to increase their effectiveness in combating serious forms of international crime which fall in the respective competence of both Parties and to avoid duplication of work. In particular, this will be achieved through the exchange of operational, strategic, and technical information, as well as the coordination of activities. The cooperation will take place with due regard to transparency, complementarity of tasks and coordination of efforts.

III.5.3.1.4. EPPS

The Green Paper only ‘offers a few points for reflection’ while it couldn’t prejudge the precise role of Eurojust in 2001. ‘In all logic, the establishment of the [EPPS] would enable Eurojust’s powers in relation to financial crimes to be preserved, as long as the [EPPS’s] priority jurisdiction regarding the protection of the Community’s financial interests was acknowledged. Consequently their functions would be complementary working in their own areas for the attainment of the area of freedom, security and justice.’ This means that the EPPS and Eurojust ‘would have to cooperate with each other closely and on a regular basis.’

The provision “from Eurojust” in article 86 TFEU obviously sees on this close relationship. On the first sight, it even can be read as the Prosecution Service eventually replacing Eurojust. But, as Zeman mentions in its presentation during the ICLN seventh Conference, ‘by the simple creation of the EPPS, the problem with judicial cooperation in the EU won’t disappear and there will still be the need for a body improving cooperation and making coordination.’ As seen above Eurojust’s mandate sees on more criminal acts than just crimes against the Union’s financial interests. As probably both the EPPS and Eurojust stay in existence, Strijards sees a big chance that the two bodies will ‘start to compete with each other’.

Fijnaut and Groenhuijsen are of the opinion that the EPPS would be another ‘new auxiliary structure’ next to the Judicial Network and Eurojust.

The ideas to establish Eurojust and the EPPS both have a common basis: the fight against organised/serious crime. The mandate of the Prosecution Service only sees on offences against the Union’s financial interests. This type of crime already falls under the competences of Eurojust. Fijnaut and Groenhuijsen are of the opinion that ‘under these circumstances it makes more sense to improve the existing bodies than

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to add a new one.’\textsuperscript{133} To come back at Strijards comment, competition to reach the same target is not an effective way of using EU institutions.

Seen the above facts and arguments, I’m of the opinion that “establishment of the European Public Prosecution Service from Eurojust” can be interpreted as follows:

- the creation of a department within Eurojust to prosecute eurofraud crimes;
- taking Eurojust’s operational process/structure etc. as an example to establish the EPPS;
- Eurojust giving parts of his powers to the EPPS (as regards the fight against fraud crimes within Europe).

In my conclusion I further elaborate on these different interpretations.

\section*{III.5.2. OLAF}

\subsection*{III.5.2.1. BACKGROUND}

‘At the institutional level, the Commission decided to establish, already in 1987 an anti-fraud unit based within its auspices. UCLAF operated in the 1990s within the context of a growing emphasis at EU level on the adoption of criminal fight against fraud, namely by providing an incentive for Member States to prosecute fraud against the Community’s financial interests in their jurisdiction.’ After a political crisis, as a result of serious allegations of financial irregularities within the Commission, UCLAF was replaced by a new unit, OLAF\textsuperscript{134}, ‘in order to investigate any such irregularities independently.’\textsuperscript{135}

\subsection*{III.5.2.2. DECISION}

The Decision confirms the following tasks of OLAF in article 2(1).

\begin{quote}
The Office shall exercise the Commission’s powers to carry out external administrative investigations for the purpose of strengthening the fight against fraud, corruption and any other illegal activity adversely affecting the Community’s financial interests, as well as any other act or activity by operators in breach of Community provisions.

The Office shall be responsible for carrying out \textit{internal administrative investigations} intended:
\end{quote}

\textsuperscript{133} Fijnaut & Groenhuijzen 2002, p. 328.
\textsuperscript{134} Decision 1999/352/EC of 28 April 1999 establishing the European Anti-Fraud Office (OLAF).
\textsuperscript{135} Mitsilegas 2009, p. 213.
- to combat fraud, corruption and any other illegal activity adversely affecting the Community's financial interests;

- to investigate serious facts linked to the performance of professional activities which may constitute a breach of obligations by officials and servants of the Communities likely to lead to disciplinary and, in appropriate cases, criminal proceedings or an analogous breach of obligations by Members of the institutions and bodies, heads of the bodies or members of staff of the institutions and bodies not subject to the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of the Communities.

The Office shall exercise the Commission's powers as they are defined in the provisions established in the framework of the Treaties, and subject to the limits and conditions laid down therein.

The Office may be entrusted with investigations in other areas by the Commission or by the other institutions or bodies.

According to its website, OLAF was ‘given responsibility for conducting administrative anti-fraud investigations and was granted special independent status. While it has [such a special] individual independent status for the investigative function, OLAF is also part of the European Commission [contrary to Eurojust, which is an EU body].’ There was, and still is, a lot of debate on the “independent” role of the anti-fraud unit with regard to internal investigations. Mitsilegas describes it as a paradox: ‘the office set out to “clean up” the financial affairs of the Commission is basically in essence the Commission itself.’ Though article 3 explicitly sees on the independence of OLAF.

The Office shall exercise the powers of investigation referred to in article 2(1) in complete independence. In exercising these powers, the Director of the Office shall neither seek nor take instructions from the Commission, any government or any other institution or body.

The nominating procedure of OLAF’s Director, in article 5, is the same as that of the European Public Prosecutor. The term of office is set on five years instead of the proposed nine for the EPP.

The Office shall be headed by a Director, nominated by the Commission, after consulting in European Parliament and the Council, for a term of five years, which may be renewed once.

The procedural rules are described in the Regulation concerning investigations conducted by the European Anti-Fraud Office.

137 Mitsilegas 2009, p. 213.
Article 1 Regulation 1073/1999

1. In order to step up the fight against fraud, corruption and any other illegal activity affecting the financial interest of the European Community, [OLAF] shall exercise the powers of investigation conferred on the Commission by the Community rules and Regulations and agreements in force in those areas.

Article 3 and 4 separates external and internal investigations. The external see on the inspections and checks in the Member States (or even in third countries); internal investigations within institutions, bodies, offices and agencies. Those investigations are “administrative investigations”, defined in article 2. These shall not affect the powers of the Member States to bring criminal proceedings.

Article 5 Regulation 1073/1999

External investigations shall be opened by a decision of the Director of the Office, acting on his own initiative or following a request from a Member State concerned.

Internal investigations shall be opened by a decision of the Director of the Office, acting on his own initiative or following a request from the institution, body, office or agency within which the investigation is to be conducted.

As provided in article 4 of the Decision, article 11 of the Regulation describes the functioning of the Supervisory Committee. It shall reinforce the Office’s independence by regular monitoring of the implementation of the investigative function.

III.5.2.3. RELATIONSHIP WITH THE EUROPEAN PUBLIC PROSECUTION SERVICE

The Corpus Juris speaks in its article 19 on the seisin and opening of proceedings that the EPP ‘must be informed by ... the European Office for the Fight against Fraud (OLAF).’ In their first chapter the authors of the Corpus find that ‘criminal law solutions should remain of last resort, which are used only when the policies of prevention and regulation have failed’. There is no elaboration on the role between the Service and the Office. Contrary to the Green Paper, which stipulates that the establishment of the Prosecution Service ‘would significantly affect OLAF’s current role. The substantive jurisdiction (compilation of facts) of the Office and the [EPPS] would partly overlap, and the relationship between them must be clearly defined.’ The Prosecution Service should be able to use the findings of OLAF’s investigations for his own behalf. ‘This means that there must be an obligation for

the Office to transmit information to the [EPPS]’ (just as the Corpus Juris proposes). The Commission, seen this examination of the future role of OLAF, makes clear that OLAF stays in existence.\textsuperscript{141}

Earlier in the Paper, the Commission makes clear that there is no judicial body to conduct investigations within the Union’s institutions. OLAF ‘is still an administrative investigation service, despite the assistance it can already offer the judicial authorities. Proceedings in cases internal to Community bodies still depends on the goodwill of the national enforcement authorities. The organization and effectiveness of internal investigations would inevitably be boosted by the establishment’ of the EPPS.\textsuperscript{142}

The current Lisbon Treaty doesn’t refer to OLAF in the article on the EPPS. This could be logic, seen the fact that OLAF is an institution of the Commission.

Seen the above facts and arguments, there are a few possibilities to take into consideration:

- to oblige OLAF in giving all the necessary information to the EPPS with regard to the fight against the EU’s financial interests;

- the creation of an administrative investigation department within the EPPS and thereby OLAF giving his mandate to the Service;

- to make the administrative sanction a method for the EPPS in settling a case.

In my conclusion I give my opinion on the ideal option.

\section*{III.5.3 EUROPOL}

\subsection*{III.5.3.1. BACKGROUND}

The entering into force of the Maastricht Treaty provided a legal basis for the negotiations and eventual signature of the Europol Convention in 1995. Just like Eurojust, Europol has a predecessor: the European Drugs Unit. It was, according to Mitsilegas, ‘envisaged as a “non-operational” team where liaison officers sent by Member States would exchange and analyze information with regard to drug trafficking.’ Europol started operations eventually in 1999. The Convention has been amended several times to expand Europol’s mandate. Via the national units and via

\textsuperscript{141} COM(2001) 715 final, p. 67 and 68.

\textsuperscript{142} COM(2001) 715 final, p. 15.
the liaison officers posted in Europol, Europol receives its information. It thus depends on the information brought by the Member States. Kohl repeatedly argued in favor of the establishment of a “European FBI”, however, as Mitsilegas explains, “[t]his centralizing approach was met with resistance by a number of Member States.”

III.5.3.2. DECISION

On 1 January of this year, the Council Decision establishing the European Police Office (Europol) entered into force. It replaced the earlier Europol Convention. Article 3 sets out the objective.

The objective of Europol shall be to support and strengthen action by the competent authorities of the Member States and their mutual cooperation in preventing and combating organised crime, terrorism and other forms of serious crime affecting two or more Member States.

As stipulated earlier regarding Eurojust, article 4 of the Europol Decision refers to the crimes which fall within both Europol’s as Eurojust’s mandate. The Annex of the Europol Decision lists them. Amongst those:

- illegal money-laundering activities;
- swindling and fraud;
- forgery of money and means of payment;
- corruption.

Europol’s tasks are set out in article 5.

Europol shall have the following principal tasks:

a) to collect, store, process, analyse and exchange information and intelligence;

b) to notify the competent authorities of the Member States without delay via the national unit referred to in Article 8 of information concerning them and of any connections identified between criminal offences;

c) to aid investigations in the Member States, in particular by forwarding all relevant information to the national units;

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143 Mitsilegas 2009, p. 162 and 163.
d) to ask the competent authorities of the Member States concerned to initiate, conduct or coordinate investigations and to suggest the setting up of joint investigation teams in specific cases;

e) to provide intelligence and analytical support to Member States in connection with major international events;

f) to prepare threat assessments, strategic analyses and general situation reports relating to its objective, including organised crime threat assessments.

III.5.3.3. RELATIONSHIP WITH THE EUROPEAN PUBLIC PROSECUTION SERVICE

Europol is not explicitly mentioned in the Corpus, but can be put under the category of ‘competent Community bodies’ as said in article 19. The Commission speaks about an information exchange cooperation between the EPPS and Europol.\textsuperscript{145} Article 88 TFEU states that Europol’s mission shall be to support and strengthen action by the Member States’ police authorities and other law enforcement services and their mutual cooperation in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy.

The article on the Prosecution Service refers to Europol.

\textit{Article 86(2) TFEU}

The European Public Prosecutor’s Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate \textit{in liaison with Europol}, the perpetrators of, and accomplices in, offences against the Union’s financial interests, as determined by the regulation provided for in paragraph 1.

Radtke mentions it very clearly that it is ‘traditionally the task of the judicial authority “public prosecutor’s office” to control the activities of the police so that enhanced efficiency does not act to the detriment of the rights of the accused.’ Further in his article, Radtke explains that a proper institution to control for the police authorities is a necessary step to take. With the new Decision, the Director (together with the Presidency of the Council and the Chairperson of the Management Board) can be requested by the European Parliament to discuss matters relating to Europol.\textsuperscript{146} What could be the relationship between Europol and

\textsuperscript{145} COM(2001) 715 final, p. 66.
\textsuperscript{146} Article 48 of the Decision of Europol.
the EPPS? And between the Prosecution Service and the national police authorities?\footnote{Radtke 2005, p. 111 and 112.}

I agree with Strijards when he mentions that it will ‘always be necessary to act jointly with the competent authorities\footnote{He refers to article 3 of the Europol Decision: all public bodies existing in the Member States which are responsible under national law for preventing and combating criminal offences.} of the Member States’. In addition he explains the problem in demand for capacity and a clear prioritisation when the EPPS would be established. ‘Who can determine the ultimate priorities?’ Strijards comes with his opinion: ‘I would like to comment that I cannot see how a federal Public Prosecutor could do anything meaningful if it did not have this control, and furthermore, that I cannot see how this control can be effectively carried out without something like a federal police department with its own trans territorial prosecutorial competences, which do not constantly require the permission of the territorial authorities to be exercised.’\footnote{Strijards 2008, p. 21, 22 and 27.} Is it realistic to establish such a “federal police department”?\footnote{Is it realistic to establish such a “federal police department”?}

Just like I did closing the discussion on the relationships with Eurojust and OLAF, I summarise a few options for the possible relation with Europol:

- Europol remains as it is and exchanges information with the Prosecution Service;
- the EPPS shall be given full control over Europol as regards fraud investigations;
- the EPPS shall have his own “police office” regarding fraud cases and Europol will keep his mandate for other serious crimes.
IV FEASIBILITY

IV.1. PROPORTIONALITY AND SUBSIDIARITY

‘To assimilate European financial interests to national financial interests is not enough to ensure “an effective and equivalent protection”. Cooperation should be the answer. However, in practice it has been shown that it is impossible to organize effective cooperation without harmonizing both substantive law and procedure. It is foreseeable that horizontal cooperation alone between states will not suffice to deal with the whole range of “eurofrais”. The unification of definitions for criminal offences and of at least part of the rules of procedure has become necessary for the effectiveness of the [European system to fight fraud].’\textsuperscript{150}

‘The Commission’s [Green Paper] is characterized by the efforts to determine the legality of the investigations and the control of the legality of these actions at the national level. The Commission has obviously been motivated to opt for such a model coupled with the principle of mutual recognition of activities of investigation by two fundamental principles of the Community’s primary law: the principle of subsidiarity and the principle of proportionality.’\textsuperscript{151}

\textit{Article 5 ToEU}

1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.

2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

3. 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, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

\textsuperscript{150} Delmas-Mart\-y & Vervaele 2000, p. 30.

\textsuperscript{151} Radtke 2005, p. 114.
The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

4. Under the **principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.**

The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

According to article 5 **ToEU** the principle of subsidiarity requires that acts of the European Union European outside its exclusive competence should be adopted only, if national measures of the Member States are not sufficient enough to achieve the particular aim. The principle of proportionality limits measures of the Union to the extent that they have to be necessary to achieve the aim. ‘From the Commission’s point of view, both principles are taken into account in an ideal way in its model since it provides only a few provisions and only a few obligations incumbent upon Member States to adjust their systems of law.’

‘In the spirit of the subsidiarity principle’, as the Commission explains, ‘the organization of the [EPPS] should be decentralized to guarantee integration into the national legal systems without [disturbing] them.’ The earlier mentioned Deputy Prosecutors are born in this consideration as they serve as a link between the central Prosecution Service and the national prosecution services. Further on the Paper points out that, ‘under the subsidiarity principle, certain cases relating to the protection of the [Union’s] financial interests could be left in the hands of the national prosecution authorities.’ With regard to the functioning of the Prosecution Service, the Commission finds it out of the question to codify European criminal law ‘as that would be out of proportion to the objective’ of fighting the offences against the financial interests of the EU.

On the one hand the Commission acknowledges the need for a prosecution service, because, the idea to establish the EPPS basically relies on the fact that Member States aren’t able to act efficiently against EU fraud crimes. And on the other hand pleads for a minimum codification of the common offences and the relevant procedures. I already tried to make clear that for the proper functioning of the Service it would be pertinently necessary to codify criminal law. This codification

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must be seen as a basis for the functioning of the EPPS. Is the codification of material and procedural criminal law than disproportionate? I don’t think so. Of course minimum standards are necessary. But even defining certain principles or offenses for the sake of the more effective functioning of the EPPS (so it would eventually not be essential to do) would be in my view proportionate and in line with the principle of subsidiarity.155

IV.2. POSITION OF MEMBER STATES

‘With his powers of direct investigation and prosecution in the whole European judicial area, the European Public Prosecutor would probably be a more effective institution. But it would imply a transfer of sovereignty for which governments do not seem to be fully prepared at this stage in time.’156 Or, as Mitsilegas describes it: ‘[the proposal of creating an EPPS] was met with strong opposition by a number of Member States, objecting to what seemed as a loss of sovereignty over criminal justice’.157 Also the academics mention in their Corpus Juris that ‘the main obstacle to the creation of an EPP is the fear that national authorities might lose a part of their autonomy in relation to the commencement, direction and conclusion of prosecution.’

The Commission, just like the authors of the Corpus, pays attention to the political sensitivity of the establishment proposal. In the Paper it sets out the positions of a few Member States. The views of, at that time, all the Member States are expressed in the Follow-up Report on the Green Paper.158 ‘The representatives of the Member States ministries concerned can be divided into three categories:

- those who support the principle of establishing a European Prosecutor (Belgium, Greece, Spain, The Netherlands, Portugal and Italy);
- those who are simply skeptical about the usefulness or feasibility of the idea (Germany, Luxembourg and Sweden);
- those who reject the project out of hand (Denmark, France, Ireland, Austria, Finland and the United Kingdom).’

‘Most of those opposed argued that the Commission had not provided sufficient justification for its proposal or illustrated the real problems faced by those responsible for the fight against Community fraud. Many also believed that it would be a good idea to first examine alternatives to prosecution before creating a Community criminal-law enforcement service. Some stressed the need to give a chance to the judicial and police cooperation bodies already in place.’\(^{160}\)

Further on in the Report, the Commission concludes that ‘there now seems to be a majority in favour of establishing a European Public [Prosecution Service] in the new constitutional Treaty or at least of eventually turning Eurojust into an [EPPS].’

\textit{Article III-274 Treaty establishing a Constitution for Europe}

1. In order to combat crimes affecting the financial interests of the Union, a European law of the Council may establish a European Public Prosecutor’s Office from Eurojust. The Council shall act unanimously after obtaining the consent of the European Parliament.

In the meanwhile, twelve European Counties became EU Member States. The obstacle of Member States’ willingness resulted in article 86(1) TFEU.

In the absence of unanimity in the Council, \textit{a group of at least nine Member States may request that the draft regulation be referred to the European Council}. In that case, the procedure in the Council shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council for adoption.

Within the same timeframe, in case of disagreement, and if \textit{at least nine Member States wish to establish enhanced cooperation on the basis of the draft regulation concerned}, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

Klip is of the opinion that ‘given the political situation of the day, it is most likely that the [EPPS] will initially start for a limited number of Member States.’ Apart from the fact that it makes the functioning of the EPPS very difficult (what happens when a person of a Member State that’s not taking part committed a fraud crime against the Union’s financial interests?), it has to be seen if at least nine Member States are willing to establish the Prosecution Service.\(^{161}\)

\(^{161}\) Klip 2009, p. 413.
CONCLUSION

The idea of a European Public Prosecution Service was developed in 1997 by a group of academics in the *Corpus Juris*. The European Commission formally proposed the creation of a Public Prosecution Service in its Green Paper. The current article 86 of the Lisbon Treaty provides the possibility to establish such a Service. The setting up of the EPPS falls within the area of freedom, security and justice. The creation of this area isn’t finished, even so, it’s set as a goal in order to make the European Union as free and safe as possible.

Using the terminology consequently and logically, I prefer to use the term “European Public Prosecutor” when speaking of the director of the European Public Prosecution Service.

The Commission, as the institution responsible for protecting the Union’s financial interest, should be the institution to appoint the Prosecutor. The EPP should be given a mandate for life, as he has no reasons to act in its own behalf finding another profession. To safeguard against political interference it’s up to the European Court of Justice to decide on the dismissal of the EPP. The nominations of the Deputy Prosecutors would be made by the European Parliament on proposal by the Member States. This is necessary because of the tight link that is needed with the national systems and procedures in order to combat the fraud crimes. Member States should make a contract with the EPP which beholds the agreement that national prosecutor X is going to work for a certain period of time for the European Public Prosecution Service in the form of Deputy Prosecutor. During his employment he must have the same privileges as if he was still a national prosecutor. The responsibility for investigations and prosecutions comes for the EPPS. This will guarantee the independence with regard to the individual Member States. Because the DP’s, hierarchically speaking, fall under the responsibility of the EPP, I see no problem to give them a renewable mandate.

The fact that the Commission appoints the EPP, doesn’t imply its political responsibility for the actions of the Service. The EPPS must become a separate organ within the European Union without falling under a specific Union institution. Of course the EPP, as head of the EPPS, can be asked to give explanation about his actions, on request of the Commission, Parliament or Council. The European Court would be the most appropriate institution to decide if the EPPS truly is not operating well.
The problem of organized crime to justify the proposal to establish an EPPS is wrongly invoked. The EPPS must provide the solution in effectively combating the fraud crimes, whilst the cooperation between the Member States and between Member States and the Union institutions is not efficiently enough to do so. Whilst the responsibility for ensuring the protection of the financial interests rests on the Member States and the European Union institutions both. The different national criminal law enforcement areas make it unnecessary complicated to fight serious attacks on shared, specifically Union interests. If the EU would become a common investigation and persecution area, the acts of the EPPS would have the same value in all the Member States. Seen the necessity of the common investigation and prosecution area, common definitions of offences are the next essential step to take. The crimes affecting the EU’s financial interest must be unified and described in secondary Union law.

For the reason that one tends to handle in his own behalf, it is logic to give a Union institution, in the form of the EPPS, the mandate to fight EU fraud crimes. It’s because of this European Union element in the crimes, that the EPPS shouldn’t be given the powers to fight other serious crimes. Only a true European institution is the best to oversee offences which directly affect the European Union. Of course I’m aware of the fact that several EU bodies (Eurojust, Europol and OLAF) already carrying out the tasks of fighting against financial crimes committed in Europe. Therefore, in order to create an effective and smooth procedure to fight the financial crimes, Eurojust should give up his powers regarding the type of crimes and continue coordinating and assisting Member States in the fight against other serious crimes. Europol should not be bothered with investigating fraud crimes either; the Service must have his own investigation service. When this is realized, the Prosecutor can determine his own priorities. The same goes for OLAF, with this understanding that it entirely will disappear within the Service. The administrative actions of OLAF can be used by the Prosecutor and don’t necessarily need to fall under a Commission institution. Even so, this will solve the problem regarding the independence of OLAF.

Secondary Union legislation is necessary to define the procedures and tasks of the Service. In the following I briefly stipulate the necessary standards to codify.

- As follows from the above, it must be the task of the EPP to oversee the incoming information and take conclusions out of that information. National enforcement authorities don’t have the broad, Community-wide view of the cases they handle.
- National authorities should be fully obliged to communicate and cooperate with the DP’s and/or EPP in order to investigations of criminal acts affecting the Union’s financial interests.

- With a system “to prosecute, except…” the role of the Service would be more transparent than when leaving the choice (prosecute or not) to the discretionary power. The EPP should take the decision.

- The ECJ must be competent to rule on certain serious disputes in the preparatory stage. The trial chamber eventually decides on the fairness of the procedure and the feasible sanction. A member of the defence unit is the appropriate person during the whole prosecution stage to elaborate on misconducts.

- A Defence Unit, where legal representatives can be chosen by suspects/accused persons, should be established, seen the diversity of languages, national legal systems and Union legislation.

- A common definition of a suspect (for financial crimes) would contribute to the effectiveness of the prosecution. At least the definition of accused is necessary.

- Practical problems must lead the choice of the EPP in which Member State to trial the case. The establishment of a European Criminal Court is disproportionate and takes the Union’s financial crimes too far away from the responsibility of the Member States. The same goes for a European Prison.

The proposers have convinced me in the establishment of one authority to fight the crimes against the financial interests of the Union effectively. However, to set up the EPPS at least one third of all the Member States must agree on this. This group of nine has yet to be formed. Apart from the fact that it makes the functioning of the EPPS very difficult when not all twenty seven Member States are in, it has to be seen if at least nine Member States are willing to establish the Prosecution Service. This will take a couple of years to realize. In the meanwhile the current bodies can be given more powers, which eventually would be transferred to the Prosecution Service.

When transferring my above mentioned suggestions into Union legislation on the functioning of the European Public Prosecution Service, the Service is able to contribute to the realization of the AFSJ. Currently the establishment itself is a bridge too far.
What I tried to make clear in this research is that the European Public Prosecution Service is at this moment a bridge too far for Europe. With the idea *an sich* is nothing wrong. Only the steps to get, ultimately, to such a Prosecution Service must be made with ultimate care.

Writing my thesis was not easy. Time was the biggest problem; I was already a fulltime employee at the Dutch Public Prosecution Service.
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