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The European Public Prosecutor's Office: Comparative Analysis with Particular National Prosecution Systems

Master Thesis

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1. Introduction

The European Public Prosecutor's Office (hereinafter the "EPPO" or the "Office"), a first supranational prosecution body worldwide, is set to be up and running by November 2020[1]. It may constitute a breakthrough in tackling fraud against the EU budget and solid base for future Europe-wide cooperation in fight against organised, cross-border crime. Or, on the contrary, the Office may become just another new EU institution with poor democratic legitimacy, many clerks and too high budget. Opinions vary among respective stakeholders[2], and even though the usefulness and profitability of this new EU Office is yet to be assessed after a sufficient time of being operable (not to mention, that it is an issue far too complex to be dealt with once and for good), I will attempt to address the matter in this thesis at least from one essential perspective.

This point of view is, in my opinion, rather crucial, as the best option to foresee, how successful is this new body going to be, and, more importantly, what can be changed and amended in order to achieve its goals more efficiently, is to compare it with currently existing prosecution systems. The criteria, which I took into consideration when choosing jurisdictions to assess, were the country's GDP,[3] both continental and Anglo-American legal system representation, the state's history and development of its legal system, as well as geopolitical influence and its democratic standards. Pursuant to those criteria, I have finally chosen Germany, France, the United States of America (hereinafter the "USA" or the "US") and Japan.

How strong is the bound between prosecutors and judges in France? What is the prosecutors' position in Japan and which powers does a Japanese prosecutor wield? Is there any special authority investigating and prosecuting white-collar crime in Germany? How are prosecutors recruited in the United States? And what are the answers in case of the EPPO? Shall we draw inspiration from the national systems; what is there to learn and implement? I will attempt to address those issues in my thesis as best as I can.

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[1] SALLES, Oliver. New kid on the block: the European Public Prosecutor's Office. *ECA Journal 2/2019, Fraud and Corruption Ethics and Integirty.* 2019. p. 65-69

[2] COLSON, R. and FIELD, S.. *EU Criminal Justice and the Challenges of Diversity: Legal Cultures in the Area of Freedom, Security and Justice*. Cambridge: Cambridge University Press, 2016, p. 91. doi: 10.1017/CBO9781316156315.

[3] STATISTICS TIMES. *Projected GDP Ranking (2019-2024).* [online]. 2019. [cit. 23/11/2019]. Available at: http://statisticstimes.com/economy/projected-world-gdp-ranking.php

2. The European Public Prosecutor's Office

2.1. History

2.1.1. First foray of a new European Prosecutor

The EPPO was first mentioned as soon as in the 1998 in the then attempt to unify criminal law EU-wide – Corpus Juris (Resolution on criminal procedures in the European Union)[4]. A section of the Resolution named Procedural arrangements and instruments introduced the possibility of appointment of a European Prosecutor, „who would operate in parallel with national public prosecutors",[5] might be given the powers to open an investigation as well as he should provide better coordination of the cross-border investigations. Moreover, Corpus Juris also stipulated the Prosecutor's competences with regard to other already existing EU institutions or European Commission (hereinafter the "Commission") Agencies, namely its control powers over Europol and OLAF. Finally, the independence of the EPPO towards Commission was being stressed as a matter of utmost importance (which is a crucial point up until to today's Regulation).[6]

Furthermore, the idea of a brand new prosecution body was also thoroughly inspected and vigorously advocated by the Commission in its Green Paper on the establishment of a European Prosecutor from 2001. In contrast with the rather vague introduction of the idea in Corpus Juris, Commission not only dealt with the general reasons for establishing this special body (with focus on the Union's financial interests), but also addressed the matter of position of the EPPO. The issue was considered in a more complex attempt of substantive and procedural law unification or the issue of sufficient fundamental rights protection. Moreover, the Green Paper also provides information on more practical matters, which are being subject to heated debate even nowadays, such as the organisational structure of the EPPO, substantive as well as procedural law applicable, and last but not least the status and relations with other stakeholders.[7]

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[4] AMBOS, K. *European Criminal Law*. Cambridge: Cambridge University Press. 2018. doi: 10.1017/9781316348628. p. 574.

[5] EUROPEAN PARLIAMENT. *Report on criminal procedures in the European Union (Corpus Juris)*. [online] 8 March 1999. [cit. 22/11/2019]. Available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A4-1999-0091+0+DOC+XML+V0//EN&language=EN

[6] EUROPEAN PARLIAMENT. *Report on criminal procedures in the European Union (Corpus Juris)*. [online] 8 March 1999. [cit. 22/11/2019]. Available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A4-1999-0091+0+DOC+XML+V0//EN&language=EN

[7] COMMISSION OF THE EUROPEAN COMMUNITIES. *GREEN PAPER on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor*. Brussels, 11 December 2001.

Nevertheless, neither the Corpus Juris nor the original proposal of Commission found its place among current valid EU legislation – fair to say, that the Commission Green Paper provided essential inspiration for the Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), (hereinafter the "EPPO Regulation" or the "Regulation") though.[8]

2.1.2. Treaty of Lisbon

In order to address multiple concerns regarding the democratic deficit of the EU institutions, as well as to tackle effectively issues arising from the accession of 10 new Member States in 2004, a major reform of the EU's very constitutional framework was strongly called upon. Therefore, a Reform Treaty (also known as Treaty of Lisbon) was introduced, and after a thorough, heated debate and opposition from certain Member States' administrations also signed in December 2007. The Lisbon Treaty then came into effect in December 2009, and since then, two core Treaties are applicable with regard to primary European law – Treaty on European Union and brand new Treaty on the Functioning of the European Union (the Treaty of Lisbon obviously provided many more crucial amendments, which are, however, not relevant for the purposes of this thesis).[9]

It was this very international agreement, which gave the EPPO idea a fresh start and fuelled it up until today. An essential Art. 86 of the new Treaty on the functioning of the European Union contains a provision, which gives the Council powers to establish a new EU institution, the EPPO, in order to combat crimes affecting the financial interests of the EU. Moreover, the Article stipulates, that the EPPO shall be created „from Eurojust".[10] On the basis of these primary-law grounds, Commission in 2013 came up with an EPPO Regulation Proposal, which was later replaced by the Council Regulation Proposal in 2017.[11] However, the criminal law area's EU-wide unification proved once again to be an obstacle difficult to overcome. Therefore, instead of a piece of secondary legislation (most likely a regulation) adopted by way of regular legislative procedure

[8] Personal consultation with prof. Gerhard Dannecker of University of Heidelberg, Faculty of Law on October 23rd, 2019.

[9] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007. In: *Official Journal C 306/1.* 17 December, 2007.

[10] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU). In: *Official Journal C 326/01*. 26 October, 2012. Art. 86.

[11] AMBOS, K. *European Criminal Law.* Cambridge: Cambridge University Press. 2018. doi: 10.1017/9781316348628. p. 574.

for all the Member States, the countries in favour of a new crime-combat institution chose to proceed on their own by the way of so-called „enhanced cooperation", foreseen in Art. 86 (1) par. 3 of the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter the "TFEU").[12] As of today, all EU countries apart from Denmark, Sweden, Ireland, Poland and Hungary take part in the enhanced cooperation (United Kingdom is not participating either, however, the country is currently on the leave from the EU).[13]

2.2. Organisation of the EPPO

In general, the EPPO does not differ from majority of other national prosecution authorities in terms of its position towards legislative, executive and judicial power. Therefore, the body is being established as an independent institution (especially stressed the independence towards Commission), with its own legal personality (in contrast with the Commission's Agencies). Moreover, the Regulation explicitly states, that the Office shall not receive any instructions from external persons outside of the EPPO.[14] However, the Office and its personnel has to be held accountable for its operations, therefore, the European Chief Prosecutor, as the head of the EPPO, is fully accountable to the EU's „Institutional triangle" – the European Parliament, the Council and the Commission. [15] Moreover, the European Chief Prosecutor is responsible, stemming from his position as head of the Office, for the conduct of all the other staff as well.

The organisation of the EPPO consists of two levels – centralised and decentralised one (the so-called „Double-Hat System"). The central part is represented by the seat of the Office in Luxembourg; on the other hand, the decentralised one consists of currently unknown number of Delegated Prosecutors (at least two per participating country), based in participating Member States.[16]

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[12] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU). In: *Official Journal C 326/01*. 26 October, 2012. Art. 86.

[13] WAHL, Thomas. European Public Prosecutor's Office Netherlands and Malta Join EPPO. *Eucrim* [online] 20 October 2018. [cit. 24/11/2019]. Max Planck Institute for Foreign and International Criminal Law (MPICC), Criminal Law Department. Available at: https://eucrim.eu/news/european-public-prosecutors-office-netherlands-and-malta-join-eppo/

[14] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'). In: *Official Journal L 283/1*. 31 October 2017. Art. 6.

[15] AMBOS, K. *European Criminal Law*. Cambridge: Cambridge University Press. 2018. doi: 10.1017/9781316348628. p. 574, 575.

[16] EUROPEAN COMMISSION. *Ec.europa.eu., European Public Prosecutor's Office.* An official website of the European Union [online]. [cit. 01/12/2019]. Available at: https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/networks-and-bodies-supporting-judicial-cooperation/european-public-prosecutors-office_en

2.2.1. Central level

Even though the Commission's initial proposal of the EPPO Regulation advocated the decentralised structure, because it „offers the most benefits and generates lowest costs"[17], the current adopted Regulation opted for a mixed structure, as was already mentioned above.

Pursuant to the current Regulation, the organisational structure of the EPPO at its centralised level in Luxembourg will comprise of the College of Prosecutors (hereinafter the „College"), the Permanent Chambers, the Administrative Director, European Prosecutors and the head of the office, the European Chief Prosecutor.[18]

The College shall decide on the long-term priorities and strategic matters of the Office, as well as general queries which might arise from investigation of particular cases (e.g. the application of the Regulation). It will consist of the European Chief Prosecutor, responsible for chairing and preparation of the College's meeting, and one European Prosecutor per each Member State (22 European Prosecutors as of today). Moreover, the „general oversight" of the EPPO's activities belongs to the responsibilities of the College as well.[19]

A feature worth mentioning, which is among the competences of the College, are the Internal rules of procedure of the EPPO (hereinafter the "Rules") – a crucial document, which further describes the competences and responsibilities of the EPPO's staff and prosecutors, as well as its operations in closer detail. A proposal of the Rules set forth by the European Chief Prosecutor is subject to a vote by the College; a two-thirds majority is necessary in order for the Rules to be adopted. It might be therefore considered a one-time competence, with the option to amend the Rules by the College by a two-thirds majority.[20] As of today, those Rules are yet to be adopted.[21]

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[17] EUROPEAN COMMISSION. *Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office.* Brussels, 2013 European Commission.

[18] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'). In: *Official Journal L 283/1.* 31 October 2017. Art. 8.

[19] AMBOS, K. *European Criminal Law.* Cambridge: Cambridge University Press. 2018. p. 575. doi: 10.1017/9781316348628.

[20] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'). In: *Official Journal L 283/1.* 31 October 2017. Art. 21.

[21] COUNCIL OF THE EUROPEAN UNION. *Non-paper from the Commission services on the state of play of the setting up of the European Public Prosecutor's Office (EPPO).* [online]. Council of the European Union. Brussels, 27 September 2019 [cit. 25/11/2019]. Available at: https://www.tweedekamer.nl/downloads/document?id=dd554cdb-273c-445f-aa04-3d4beebcd653&title=Note%20Council%20of%20the%20European%20Union.pdf

Regarding the Permanent Chambers, contrary to the College, they are granted mostly the operational powers within the framework of particular investigations conducted by the Delegated Prosecutors. Pursuant to the Rules, an equal distribution of workload among the prosecutors shall be ensured by means of random allocation of cases. In particular, the Permanent Chambers will mostly supervise the investigations and specific Delegated Prosecutors allocated to the cases.[22] For those purposes the Chambers wield certain powers and competences, such as to bring a case to judgment, to dismiss a case or to refer it to a national authority. Moreover, apart from the above mentioned decisions, which constitute a rather „ordinary" investigation process, the Chambers may even take action in the framework of more unique situations, such as to order the European Delegated Prosecutor to exercise the right of evocation (meaning, pursuant to Art. 27 of the Regulation, that the national authorities are obliged not to initiate an investigation under the respective national law).[23] Every Permanent Chamber is going to consist of three prosecutors – the Chair and two permanent Members.[24]

Furthermore, the Administrative Director is another key official in the structure of the EPPO (even more so until the Office is completely established), with competences of various kinds, mostly budgetary and administrative. A list of candidates shall be proposed by the European Chief Prosecutor, from which it is up to the College to make the final choice. The Regulation provides an exhaustive list of his diverse administrative responsibilities, however, the Director's core competence is, with no doubt, the implementation of the EPPO's budget. Nonetheless, the above stated will apply only in the later stages of the Office's operations. Regarding the current state, i.e. the EPPO not being established yet, Art. 20 of the Regulation stipulates the interim measures, such as the Commission appointing its official as the Administrative Director.[25]

The European Prosecutors, one per each Member State, represent the pillar of the Office itself, as all of them together form the College and, moreover, it is them who act as supervisors of the

[22] AMBOS, K. *European Criminal Law*. Cambridge: Cambridge University Press. 2018. doi: 10.1017/9781316348628. p. 575.

[23] CSONKA, Peter; JUSZCZAK, Adam and SASON, Elisa. The Establishment of the European Public Prosecutor's Office, The Road from Vision to Reality. *Eucrim*. [online]. 2017, 3 [cit. 01/12/2019]. Available at: https://eucrim.eu/articles/establishment-european-public-prosecutors-office/

[24] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'). In: *Official Journal L 283/1*. 31 October 2017. Art. 10.

[25] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'). In: *Official Journal L 283/1*. 31 October 2017. Art. 9, 10.

investigations led by the Delegated Prosecutors (through their presence in the Permanent Chambers).[26]

Last but not least is the European Chief Prosecutor – the head of the EPPO, plus his two deputies. As the name of the position in the structure itself implies, the European Chief Prosecutor is the director of the Office, responsible for its organisation and strategic decisions. He acts in certain matters in other part of the organisational structure as well, such as in the Permanent Chambers or the College. Two deputies are going to be allocated to the Chief Prosecutor in order to assist him with fulfilling his tasks and duties, as well as they are going to act on his behalf in case he/she is not available.[27] Laura Kövesi, a former Romanian general prosecutor, is supposed to become the first European Chief Prosecutor, following exhaustive negotiations of all the stakeholders, which resulted in the Parliament and Council representatives' agreement. Kövesi's appointment is perceived as a win for the Parliament, which backed her from the very beginning. On the other hand, on the losing side is the current Romanian government, that sacked Kövesi out of a high-profile anti-corruption general prosecutor job despite (or maybe because of) a string of successful indictments against numerous government officials. [28]

2.2.2. Decentralised level

The decentralised level, on the other hand, consists only of the Delegated European Prosecutors, who are going to be based in their national states. It is them, who are to investigate the cases and bring them to judgment before respective national courts.[29] Therefore, it is of utmost importance to determine the relationship between the EU, EPPO and the national judicial system. First and foremost, the cases are not going to be heard in front of the Court of Justice of the European Union (hereinafter the "CJEU"), but rather in front of courts and judges of the Member States itself. However, the CJEU is not completely powerless; apart from its probably most well-

[26] EUROPEAN COMMISSION. Ec.europa.eu., European Public Prosecutor's Office. An official website of the European Union [online]. [cit. 15/12/2019]. Available at: https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/networks-and-bodies-supporting-judicial-cooperation/european-public-prosecutors-office_en

[27] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'). In: *Official Journal L 283/1*. 31 October 2017. Art. 11

[28] GOTEV, Georgi. Parliament wins its battle: Kövesi to become first EU Public Prosecutor. In: *Euractiv*. [online]. 2019 [cit. 05/12/2019]. Available at: https://www.euractiv.com/section/justice-home-affairs/news/parliament-wins-its-battle-kovesi-to-be-the-first-eu-public-prosecutor/

[29] EUROPEAN COMMISSION. Ec.europa.eu., European Public Prosecutor's Office. An official website of the European Union [online]. [cit. 15/12/2019]. Available at: https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/networks-and-bodies-supporting-judicial-cooperation/european-public-prosecutors-office_en

known competence (the preliminary ruling, in this context with regards to the interpretation and validity of the Regulation, EPPO's decisions, etc.), it shall additionally act in other matters. Worth mentioning are especially issues concerning compensation litigation (e.g. damage claim resulting from unjustified criminal proceedings), or disputes with the Office staff and dismissal procedure of the European Prosecutors, including the Chief Prosecutor.[30]

With regards to the national level, the state's prosecutors will act as both national law enforcement and the EPPO's staff, wearing a so-called „Double Hat".[31] This expression means, that while investigating and prosecuting crimes pursuant to the state's applicable laws, they will wear the national „hat", acting as national prosecutors. However, when prosecuting wrongdoings stipulated in the Regulation, they change the „hat" to become the European Delegated Prosecutors, as an arm of the EPPO, with EU laws applicable to their operations, accountability and status. Such a unique, dual system was introduced mainly in order to enable the prosecutors representing EPPO to execute the competences and investigative measures granted otherwise only to the national prosecutors.[32]

The relations (and dispersion of decision-making power) between the centralised, Luxembourg-based Permanent Chambers and the decentralised Delegated Prosecutors are likely to create tensions in the future,[33] mostly due to the sensitivity of common EU-wide criminal law framework and the Member States' willingness to maintain sovereignty in these matters. However, even though future political officials investigated for PIF offences may proclaim, that they are not going to subject themselves to a prosecution from the EU level and that they are only accountable to the people and laws of their country, the EU law offers no such option. A coherent line of decision-making is being kept by the CJEU since the breakthrough Costa v. Enel[34] and Simmenthal[35] decisions: the primacy of EU law over the national one is one of the essential cornerstones of the whole Union. The same applies in case of the EPPO Regulation and Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against

[30] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'). In: *Official Journal L 283/1*. 31 October 2017. Art. 42.

[31] AMBOS, K. *European Criminal Law*. Cambridge: Cambridge University Press. 2018. doi: 10.1017/9781316348628. p. 575.

[32] Personal consultation with prof. Gerhard Dannecker of University of Heidelberg, Faculty of Law on October 23rd, 2019.

[33] AMBOS, K. *European Criminal Law*. Cambridge: Cambridge University Press. 2018. doi: 10.1017/9781316348628. p. 575.

[34] Case 6-64, *Flaminio Costa v E.N.E.L.* [1964] ECLI:EU:C:1964:66

[35] Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*. [1978] ECLI:EU:C:1978:49

fraud to the Union's financial interests by means of criminal law (hereinafter the "PIF Directive" or "Directive"), in line with the CJEU ruling in Van Duyn[36] case, and therefore, any future attempts of questioning the EPPO's powers or competences with the arguments of national law would be void, because no application of national law, which contradicts directly applicable EU legislation is permitted by any national authority.[37]

2.3. Scope of crimes

The protection of Union's financial interests is a scientific, legal term to describe the EU's efforts aimed at achieving sound defence of the Union's revenue and expenditure. Member states on their own often struggle to protect and recover their own national funds, and the administrations have little concern over a budget, which is not solely theirs. A common pool of money of this enormous size unsurprisingly draws attention of many, even more so when it is being administered by a complex organisation such as the Union. An alarming amount of estimated 500 million EUR was lost to fraud to the EU budget in the sole year of 2017[38], and this figure accounts only for the detected fraud conduct. Therefore, the Union decided to take action, adopting the Directive on the fight against fraud to the Union's financial interests by means of criminal law, which mirrors the scope of action of the EPPO.[39]

2.4. The PIF Directive

After a long-time period of the substantive criminal law being stipulated in an international agreement, the PIF Convention,[40] the time came in April 2017 to adopt a new EU piece of legislation, the PIF Directive (fair to mention, that numerous proposals, negotiations and interim steps preceded the adoption of the Directive itself, commencing as early as in 2012 by the

[36] Case 41-74, *Yvonne van Duyn v Home Office*. [1974] ECLI:EU:C:1974:133
[37] TOMÁŠEK, Michal; TÝČ, Vladimír a kol. *Právo Evropské unie. 2. aktualizované vydání*. Prague: Leges, 2017. p. 74
[38] PUBLICATIONS OFFICE OF THE EUROPEAN UNION. *Protecting taxpayers against fraud and corruption*. [online]. [cit. 19/12/2019]. Available at: https://ec.europa.eu/info/sites/info/files/eppo_factsheet_en.pdf
[39] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'). In: *Official Journal L 283/1*. 31 October 2017. Art. 22
[40] KAIFA GBANDI, M. Protection of the EU's financial interests by means of criminal law in the context of the Lisbon Treaty and the 2017 directive (EU 2017/1371) on the fight against fraud to the Union's financial interests. *Criminal Law Aspects of the Protection of the Financial Interests of the EU with particular emphasis on the national legislation on tax fraud, corruption, money laundering and criminal compliance with reference to cybercrime*. Wolters Kluwer Hngary Kft., 2019. p. 39

Commission's first PIF Directive proposal).[41] Not only does it provide certain standards, in the borders of which the Member States are obliged to operate when it comes to defining and penalizing crimes against EU budget, but the Directive also establishes the EPPO's competences.[42] Furthermore, contrary to the Convention, in case of non-compliance of the Member States, i.e. when the State does not transpose the Directive correctly, or not at all, a sanction in the form of financial penalty is now available[43] (see Art. 258 TFEU, which grants Commission the power to bring a case before CJEU, if it is of the opinion, that the Member State „failed to fulfil its obligations", and Art. 260 introducing the fine for such misconduct).[44]

It is also crucial to note, that the competence to adopt the current PIF Directive may stem from different parts of the primary law, in particular either from Art. 83 (2) TFEU or Art. 325 (4) TFEU.[45] Even though Art. 325 was envisaged as a basis for the Directive in the Commission's initial proposal, Art. 83 was finally chosen. Such a choice leads to an important conclusion: unlike pursuant to Art. 325, where „measures" are mentioned by the lawmaker, which implies the option of adopting either directives or regulations, Art. 83 provides only for directives.[46] Furthermore, Art. 83 explicitly provides the option for the „emergency brake" – a feature available not only in the area of judicial cooperation in criminal matters, which allows any Member State to refer the directive at hand to the European Council, thus suspending the ordinary legislative procedure, in case they consider the piece of legislation to „affect fundamental aspects of their criminal justice

[41] GRÄSSLE, Ingeborg; LÓPEZ AGUILAR Juan Fernando. PROTECTION OF THE UNION'S FINANCIAL INTERESTS (PIF DIRECTIVE). LEGISLATIVE TRAIN SCHEDULE, AREA OF JUSTICE AND FUNDAMENTAL RIGHTS. [online]. 2019, 20 November [cit. 10/12/2019]. Available at: http://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-protection-of-the-union-s-financial-interests-(pif-directive)

[42] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'). In: *Official Journal L 283/1*. 31 October 2017. Art. 4

[43] KAIFA GBANDI, M. Protection of the EU's financial interests by means of criminal law in the context of the Lisbon Treaty and the 2017 directive (EU 2017/1371) on the fight against fraud to the Union's financial interests. *Criminal Law Aspects of the Protection of the Financial Interests of the EU with particular emphasis on the national legislation on tax fraud, corruption, money laundering and criminal compliance with reference to cybercrime*. Wolters Kluwer Hngary Kft., 2019. p. 36

[44] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU). In: *Official Journal C 326/01*. 26 October, 2012. Art. 258 and 260

[45] KAIFA GBANDI, M. Protection of the EU's financial interests by means of criminal law in the context of the Lisbon Treaty and the 2017 directive (EU 2017/1371) on the fight against fraud to the Union's financial interests. *Criminal Law Aspects of the Protection of the Financial Interests of the EU with particular emphasis on the national legislation on tax fraud, corruption, money laundering and criminal compliance with reference to cybercrime*. Wolters Kluwer Hngary Kft., 2019. p. 37

[46] KAIFA GBANDI, M. Protection of the EU's financial interests by means of criminal law in the context of the Lisbon Treaty and the 2017 directive (EU 2017/1371) on the fight against fraud to the Union's financial interests. *Criminal Law Aspects of the Protection of the Financial Interests of the EU with particular emphasis on the national legislation on tax fraud, corruption, money laundering and criminal compliance with reference to cybercrime*. Wolters Kluwer Hngary Kft., 2019. p. 37, 38

system".[47] Moreover, hand in hand with the emergency brake goes the possibility to take part in an enhanced cooperation, so that in case of disagreement between all of the Member States, at least nine of them may cooperate nonetheless.[48]

2.4.1. Types of criminal conduct

At first, the Directive provides clarification with regard to what shall be considered as the financial interests of the EU – „ all revenues, expenditure and assets covered by, acquired through, or due to: the Union budget; the budgets of the Union institutions…".[49]

Afterwards the Directive stipulates definitions of the offences against the EU budget. Those account for fraud affecting the Union's financial interests, be it expenditure or revenue related fraud, as the most broadly defined crime, and other offences, namely money laundering, active and passive corruption and misappropriation of funds. Furthermore, VAT fraud is also partially covered by the Directive, however, only in case of „the most serious forms" of such conduct, with a distinguishing criteria of a high-value threshold and the territory of at least two Member States (see also Directive on the common system of VAT for more information regarding VAT fraud).[50]

The inclusion of VAT fraud is somewhat questionable, as there was strong opposition against it from the Member States (via the Council) among the negotiations, in which the Council claimed, that VAT is a sole national matter.[51] One of the main reasons behind it was the fact, that only a small percentage of the overall collected VAT tax is being levied to the EU (the particular figure is calculated based on each country's "VAT base")[52] and therefore fraud related to this tax shall be mostly concern of the Member States. In the end, a compromise was agreed on, introducing the

[47] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU). In: *Official Journal C 326/01*. 26 October, 2012. Art. 83

[48] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU). In: *Official Journal C 326/01*. 26 October, 2012. Art. 83

[49] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law. In: Official Journal L 198/29. 28 July, 2017. Art. 2

[50] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law. In: *Official Journal L 198/29*. 28 July, 2017. Art. 3 and 4

[51] JUSZCZAK,Adam; SASON, Elisa. The Directive on the Fight against Fraud to the Union's Financial Interests by means of Criminal Law (PFI Directive). *Eucrim* [online] 2017, 2, 80-87. [cit. 01/12/2019]. Available at: https://eucrim.eu/articles/the-pfi-directive-fight-against-fraud/

[52] EUROPEAN COMMISSION. *Ec.europa.eu., Value added tax-based own resource*. An official website of the European Union [online]. [cit. 12/12/2019]. Available at: https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/networks-and-bodies-supporting-judicial-cooperation/european-public-prosecutors-office_en

above-mentioned threshold and cross-boarder element. However, it is crucial to mention, that the agreement was reached only after a breaking "Taricco" CJEU decision,[53] which confirmed the inclusion of VAT under the term of fraud pursuant to the then PIF Convention. [54]

2.4.1.1. Fraud affecting the Union's financial interests

With regards to fraud, a broad definition is provided for in the Directive; in general, the acts of presentation of false documents or statements, non-disclosure of essential information and misapplication of funds all constitute fraud pursuant to the Directive.[55] Moreover, such conduct or omission might be related to procurement or non-procurement related expenditures as well as revenues, and further diversifies those two, as with respect to procurement related expenditure, the misapplication of funds mentioned in the pertinent provision has to lead to damaging the EU's financial interests, whereas in case of non-procurement related fraud, a mere misapplication of funds establishes a criminal offence. Furthermore, a mere negligent conduct (omission) is not sufficient, the fraud must be committed intentionally.[56]

2.4.1.2. Other criminal offences

Apart from the core crime, fraud, the PIF Directive stipulates other offences affecting the Union's financial interests, which consist of money laundering, active and passive corruption, misappropriation of funds and most serious types of VAT fraud.[57]

A special Directive exists which deals with the issues of money laundering and terrorism financing (Directive (EU) 2015/849). It defines money laundering in its Art. 1, basically stating,

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[53] Case C 105/14, *Italy vs. Ivo Taricco, Ezio Filippi, Isabella Leonetti, Nicola Spagnolo, Davide Salvoni, Flavio Spaccavento and Goranco Anakiev*. [2015] ECLI:EU:C:2015:555

[54] JUSZCZAK,Adam; SASON, Elisa. The Directive on the Fight against Fraud to the Union's Financial Interests by means of Criminal Law (PFI Directive). Eucrim [online] 2017, 2, 80-87. [cit. 01/12/2019]. Available at: https://eucrim.eu/articles/the-pfi-directive-fight-against-fraud/

[55] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law. In: *Official Journal L 198/29*. 28 July, 2017. Art. 3

[56] KAIFA GBANDI, M. Protection of the EU's financial interests by means of criminal law in the context of the Lisbon Treaty and the 2017 directive (EU 2017/1371) on the fight against fraud to the Union's financial interests. *Criminal Law Aspects of the Protection of the Financial Interests of the EU with particular emphasis on the national legislation on tax fraud, corruption, money laundering and criminal compliance with reference to cybercrime*. Wolters Kluwer Hngary Kft., 2019. p. 40, 41

[57] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law. In: *Official Journal L 198/29*. 28 July, 2017. Art. 4

that money laundering is any conduct related to a property derived from criminal activity, which aims at concealing its true origin, as well as attempt or participation thereto.[58]

The PIF Directive, however, aims only at penalizing conduct related to money laundering of illicit gains derived from offences damaging the financial interests of the EU („…property derived from the criminal offences covered by this Directive…").[59]

Both active and passive corruption and misappropriation of funds – an act of using funds contrary to the purpose which they were provided for – constitutes the other two crimes. Nevertheless, corruption and embezzlement may only be committed by a „public official", a term defined in the Directive as either an official of the EU (described in the Article 4 as well), or a national official, pursuant to respective national laws.[60] Lastly, the most threatening cases of VAT fraud are provided for in the Directive, stipulating a threshold of total damage of at least 10 000 000 EUR as well as a condition of at least two member states involvement (the above-mentioned international aspect, which lacks among the other offences).[61]

Moreover, the term „Public Official" is further defined as a Union official, or national official of basically any country. In order to prevent any doubts, seconded national experts (or even individuals or legal persons contracted on the national level operating with part of EU's budget), and all staff employed by the EU on any level clearly fall under the Union official category.[62]

Furthermore, as some of the offences at hand, namely money laundering and bribery, are currently subject to criminal liability under different pieces of European legislation, questions are being raised with regards to the necessity of such a broad scope of crimes. Why bother with once again criminalising conduct, which is already subject to criminal sanctions pursuant to European

[58] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (Text with EEA relevance). In: *Official Journal L 141/73*. 5 June, 2015. Art. 1

[59] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law. In: Official Journal L 198/29. 28 July, 2017. Art. 4

[60] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law. In: Official Journal L 198/29. 28 July, 2017. Art. 4

[61] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law. In: Official Journal L 198/29. 28 July, 2017. Art. 2

[62] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law. In: Official Journal L 198/29. 28 July, 2017. Art. 4

or national law, sometimes even both? European Public Prosecutor's Office is the answer, many say, as the Directive provides for its competences.[63] However, such a process establishes a whole new approach towards substantive criminal law, which is in this case being created on demand of the procedural one. Therefore, it is threatening the sole values and principles, which shall be protected, as those values should be first and foremost defined by the substantive law.[64]

2.4.2. Sanctions

Contrary to the former PIF Convention, the Directive provides for sanctions for the stipulated offences, and divides them to individual sanctions and sanctions imposed on legal persons.[65] First and foremost the Directive introduces general rules, which the Member States must abide when transposing it and forging particular, tailor-made sanctions. Such sanctions shall be „effective, proportionate and dissuasive", which is a term first used in a famous CJEU decision concerning imported Yugoslavian maize.[66] Furthermore, the Directive states, that (with respect to the provided range of sanctions) the maximum penalty for the offences at hand must be in the form of imprisonment, and also stipulates particular minimum and maximum penalties for the pertinent offences.[67]

An imprisonment of at least four years must be introduced as a maximum penalty by the Member States with respect to all of the offences, if they exceed the damage threshold of 100 000 EUR (so-called „considerable damage"). However, with regards to VAT fraud, the damage must be over 10 000 000 EUR, which may raise certain doubts in terms of the sanctions being proportionate (which, as mentioned above, is an essential requirement for all the sanctions at hand).

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[63] KAIFA GBANDI, M. Protection of the EU's financial interests by means of criminal law in the context of the Lisbon Treaty and the 2017 directive (EU 2017/1371) on the fight against fraud to the Union's financial interests. *Criminal Law Aspects of the Protection of the Financial Interests of the EU with particular emphasis on the national legislation on tax fraud, corruption, money laundering and criminal compliance with reference to cybercrime*. Wolters Kluwer Hngary Kft., 2019. p. 44, 45

[64] KAIFA GBANDI, M. Protection of the EU's financial interests by means of criminal law in the context of the Lisbon Treaty and the 2017 directive (EU 2017/1371) on the fight against fraud to the Union's financial interests. *Criminal Law Aspects of the Protection of the Financial Interests of the EU with particular emphasis on the national legislation on tax fraud, corruption, money laundering and criminal compliance with reference to cybercrime*. Wolters Kluwer Hngary Kft., 2019. p. 45

[65] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law. In: Official Journal L 198/29. 28 July, 2017. Art. 7 and 9

[66] Case 68/88*, Commission of the European Communities v Hellenic Republic*. [1989] Ref. no.: 61988J0068

[67] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law. In: Official Journal L 198/29. 28 July, 2017. Art. 7

Furthermore, it is also crucial to note, that no minimal figure with regards to minimum penalty is introduced in the Directive for any offence.[68]

Article 8 constitutes an aggravated circumstance in case one of the offences is committed within a criminal organisation.[69] However, as many Member States consider taking part in a criminal organisation a separate offence, the Directive had to deal with this clash in its preamble – if the respective national law stipulates taking part in a criminal organisation as a separate crime with even tougher sanctions, Art. 8 of the Directive is not mandatory.[70]

Moreover, the Member States are being left with discretionary powers with regards to the stipulated offences, when the total damage does not amount to 10 000 EUR.[71] In such cases, non-criminal sanctions might be introduced.[72]

The sanctions imposed on legal persons are dealt with further below along with the issue of liability of legal persons.

Last but not least, in light of the current logical trend to focus more on the proceeds of crime and not only on the criminals (Asset Recovery), the Directive provides for an obligation imposed on the Member States to ensure, that proceeds and instrumentalities of respective crimes may be frozen and confiscated. The Directive further refers to the Directive on freezing and confiscation of instrumentalities and proceeds of crime in the European Union.[73]

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[68] KAIFA GBANDI, M. Protection of the EU's financial interests by means of criminal law in the context of the Lisbon Treaty and the 2017 directive (EU 2017/1371) on the fight against fraud to the Union's financial interests. *Criminal Law Aspects of the Protection of the Financial Interests of the EU with particular emphasis on the national legislation on tax fraud, corruption, money laundering and criminal compliance with reference to cybercrime*. Wolters Kluwer Hngary Kft., 2019. p. 42, 43

[69] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law. In: Official Journal L 198/29. 28 July, 2017. Art. 8

[70] KAIFA GBANDI, M. Protection of the EU's financial interests by means of criminal law in the context of the Lisbon Treaty and the 2017 directive (EU 2017/1371) on the fight against fraud to the Union's financial interests. *Criminal Law Aspects of the Protection of the Financial Interests of the EU with particular emphasis on the national legislation on tax fraud, corruption, money laundering and criminal compliance with reference to cybercrime*. Wolters Kluwer Hngary Kft., 2019. p. 40, 41

[71] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law. In: Official Journal L 198/29. 28 July, 2017. Art. 7

[72] KAIFA GBANDI, M. Protection of the EU's financial interests by means of criminal law in the context of the Lisbon Treaty and the 2017 directive (EU 2017/1371) on the fight against fraud to the Union's financial interests. *Criminal Law Aspects of the Protection of the Financial Interests of the EU with particular emphasis on the national legislation on tax fraud, corruption, money laundering and criminal compliance with reference to cybercrime*. Wolters Kluwer Hngary Kft., 2019. p. 44

[73] KAIFA GBANDI, M. Protection of the EU's financial interests by means of criminal law in the context of the Lisbon Treaty and the 2017 directive (EU 2017/1371) on the fight against fraud to the Union's financial interests.

In addition, an important matter regarding sanctions was addressed by the CJEU – if both administrative as well as criminal sanctions may be imposed on the convicted person for one offence. Even though the *ne bis in idem* cornerstone principle exists, the outcome was positive: both sanctions may be imposed, if the administrative ones are not criminal in nature.[74] The criminal nature of the sanctions shall be determined according to three ECHR criteria, so-called "Engel criteria".[75] Those consist of the classification of the crime under respective national law, the nature of the offence, and seriousness of the sanction, which might have been incurred on the person.[76]

2.4.3. Other important features

First essential aspect of the PIF Directive is the liability of legal entities, which was included in the previous PIF Convention as well (in the Second Protocol thereto).[77] Article 9 of the Directive provides for a list of sanctions[78], however, is only recommendatory and non-binding, mirroring the approach of the previous legal instrument once again. Nevertheless, some additional sanctions have been introduced, namely closure of establishments that have been used for committing the criminal offense and exclusion from public tender procedures.[79]

Furthermore, forms of participation and preparation of the pertinent criminal offences shall be punishable as well pursuant to the Directive.[80]

Criminal Law Aspects of the Protection of the Financial Interests of the EU with particular emphasis on the national legislation on tax fraud, corruption, money laundering and criminal compliance with reference to cybercrime. Wolters Kluwer Hngary Kft., 2019. p. 43, 44

[74] Case Åklagaren v Hans Åkerberg Fransson https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62010CJ0617

[75] EUROPEAN COURT OF HUMAN RIGHTS. *Guide on Article 4 of Protocol No. 7 to the European Convention on Human Rights, Right not to be tried or punished twice.* 2016, updated on 31 August 2019.

[76] Case 5370/72, Case of Engel and others v. The Netherlands [1976] European Court of Human Rights. Application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72

[77] JUSZCZAK,Adam; SASON, Elisa. The Directive on the Fight against Fraud to the Union's Financial Interests by means of Criminal Law (PFI Directive). *Eucrim* [online] 2017, 2, 80-87. [cit. 01/12/2019]. Available at: https://eucrim.eu/articles/the-pfi-directive-fight-against-fraud/

[78] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law. In: *Official Journal L 198/29*. 28 July, 2017. Art. 9

[79] STOLZ, Anne-Cathérine and GESLEY, Jenny. European Union: New Rules to Fight Crimes Against the EU's Budget Take Effect. *The Law Library of Congress*. 2019. [cit. 02/12/2019]. Available at: http://www.loc.gov/law/foreign-news/article/european-union-new-rules-to-fight-crimes-against-the-eus-budget-take-effect/

[80] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law. In: Official Journal L 198/29. 28 July, 2017. Art. 5

There is an ongoing debate with respect to the EU's competence in the matter of limitation periods – see CJEU case Tarico II,[81] in which the court ruled, that protection of fundamental rights and principles (including general limitation periods, which are undoubtedly part of the Member States' criminal systems core) must prevail over the protection of financial interests pursuant to Art. 325 TFEU, as well as a general provision stating, that the Member States are obliged to take the same measures to secure the financial interests of the EU, as they have introduced to protect their own.[82] Nevertheless, a minimum limitation period, in particular five years, is required pursuant to Art. 12 of the Directive (if other conditions regarding maximum sanctions are met).[83]

2.5. Other EU institutions and their relationship with the EPPO

2.5.1. OLAF

2.5.1.1. Overview

2.5.1.1.1. Introduction and history

The European Anti-Fraud Office („hereinafter „OLAF"), is an independent agency of the Commission aimed at detecting, investigating and preventing various forms of fraud against EU funds.[84] It was established in 1999, and since 2013, the establishing Commission Decision and two Regulations have been replaced by the Regulation No 883/2013, which currently governs all of its operations.[85]

2.5.1.1.2. Investigations and other tasks

[81] C-42/17, *M.A.S., M.B*., ECLI:EU:C:2017:936 Italian Constitutional Court, Order no. 24/2017

[82] KAIFA GBANDI, M. Protection of the EU's financial interests by means of criminal law in the context of the Lisbon Treaty and the 2017 directive (EU 2017/1371) on the fight against fraud to the Union's financial interests. *Criminal Law Aspects of the Protection of the Financial Interests of the EU with particular emphasis on the national legislation on tax fraud, corruption, money laundering and criminal compliance with reference to cybercrime*. Wolters Kluwer Hngary Kft., 2019. p. 58-63

[83] KAIFA GBANDI, M. Protection of the EU's financial interests by means of criminal law in the context of the Lisbon Treaty and the 2017 directive (EU 2017/1371) on the fight against fraud to the Union's financial interests. *Criminal Law Aspects of the Protection of the Financial Interests of the EU with particular emphasis on the national legislation on tax fraud, corruption, money laundering and criminal compliance with reference to cybercrime*. Wolters Kluwer Hngary Kft., 2019. p. 47, 48

[84] AMBOS, K. *European Criminal Law*. Cambridge: Cambridge University Press. 2018. doi: 10.1017/9781316348628. p. 560, 561.

[85] AMBOS, K. *European Criminal Law*. Cambridge: Cambridge University Press. 2018. doi: 10.1017/9781316348628. p. 560.

The agency's main tasks are therefore conducting investigations with respect to EU expenditures (mostly various kinds of funds, third-country aid or direct expenditures) and some revenues (customs duties), investigations of diverse forms of misconduct of EU officials, and last but not least, development of fraud prevention policies.[86]

It is of utmost significance to distinguish between investigations carried out by OLAF, which are administrative by nature, and criminal investigations or proceedings, which do not belong in the institution's competences. Since OLAF is neither a prosecutor nor a court, but rather an administrative entity, its preliminary investigations only result in a report, on the basis of which criminal proceedings then might be initiated.[87] However, it is often not the case, either because the detected wrongdoing does not constitute any criminal offence, but rather only some kind of an administrative infringement (this is actually roughly 80% of OLAF's detections)[88], or because the recommendation to prosecute in the report is not being complied with by the member state. Numerous cases throughout OLAF's history ended up with the sole unheeded instruction to prosecute, thus further fuelling the idea of EPPO establishment, which would have the essential drive and competences to get things done to the very end.[89]

The office divides every initiated investigation into either the Internal or External investigations category. The Internal ones are aimed at misconduct among the EU institutions and their officials itself, and OLAF has a wide spectrum of competences with regards to those. On the other hand, in External investigations, the respective national authorities call the shots, and even though the state's institutions are required to cooperate, OLAF is nonetheless bound by the national procedural law and cannot, without the pertinent authority, for example confiscate the suspect's hardware and acquire the data stored within. Furthermore, apart from those two core investigation archetypes, OLAF serves as a cooperation platform, and provides essential data and contacts to the national stakeholders.[90]

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[86] AMBOS, K. *European Criminal Law*. Cambridge: Cambridge University Press. 2018. doi: 10.1017/9781316348628. p. 561

[87] AMBOS, K. *European Criminal Law*. Cambridge: Cambridge University Press. 2018. doi: 10.1017/9781316348628. p. 561

[88] Personal consult with Mr. Lukáš Jelínek, OLAF employee, at the conference „Kariéra v EU aneb pracovní možnosti českých právníků" held in Prague. 23 September, 2019.

[89] Personal consult with Mr. Lukáš Jelínek, OLAF employee, at the conference „Kariéra v EU aneb pracovní možnosti českých právníků" held in Prague. 23 September, 2019.

[90] AMBOS, K. *European Criminal Law*. Cambridge: Cambridge University Press. 2018. doi: 10.1017/9781316348628. p. 561, 562

2.5.1.1.3. Investigative measures

In order to investigate the detected irregularities, the office is equipped with various tools. However, one must always bear in mind, that the use of those measures depends on the type of investigation, as explained above. Among the core features available are the inspections of premises, pertinent interviews (such as with witnesses or „suspects“) or various forensic methods.[91]

2.5.1.1.4. OLAF and politics

Worth mentioning are also the political pressures applied on OLAF, which might be expected in the same volume, if not even stronger, in case of the EPPO as well. Apart from the infamous case of alleged subsidy fraud of the Czech prime minister Andrej Babiš,[92] another issue arose when the European Central Bank (hereinafter the „ECB“) and European Investment Bank (hereinafter the „EIB“) advocated the idea, that the prevention of corruption and fraud is subject solely to their internal auditors. However, CJEU clearly ruled against it, providing OLAF with the authority to investigate even among the ECB and EIB.[93]

2.5.1.1.5. Performance and statistics

What do the EU taxpayers pay with their money for? OLAF answers at its website with figures: for roughly 60 mil. EUR budget, it conducted almost 2000 investigations so far, which resulted in around 2500 recommendations for action to the pertinent national authorities. Moreover, almost 7 billion EUR was recommended for recovery[94], clearly multiple times overcoming OLAF‘s own budget.

2.5.1.2. Relationship between OLAF and the EPPO

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[91] Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999. In: Official Journal L 248/1. 18 September, 2013

[92] LOPATKA, Jan. Czech attorneys drop fraud charges against billionaire PM Babis. *Reuters* [online]. 2019. [cit. 25/12/2019]. Available at: https://www.reuters.com/article/us-czech-babis/czech-attorneys-drop-fraud-charges-against-billionaire-pm-babis-idUSKCN1VY0U8

[93] AMBOS, K. *European Criminal Law*. Cambridge: Cambridge University Press. 2018. doi: 10.1017/9781316348628. p. 562.

[94] EUROPEAN COMMISSION. *Ec.europa.eu., OLAF’s results in figures.* An official website of the European Union [online]. [cit. 20/12/2019]. Available at: https://ec.europa.eu/anti-fraud/investigations/fraud-figures_en

As for the relationship of the two institutions itself, at least with respect to the external investigations, competences of the EPPO and OLAF clearly concur, many claim. However, that is only partially true, as the criminal offences make up only less than 20% of the wrongdoings investigated by OLAF.[95] In case of those 20%, pursuant to the Regulation, EPPO is going to play the dominant role, with OLAF acting more as a supporting and complementary body. The effective exchange of information as well as prevention of duplicity (both of the offices investigating the same wrongdoing) are being stressed in terms of the cooperation. Furthermore, OLAF is going to be obliged to report any criminal offence, which was detected during its operations, to the EPPO, which constitutes the same reporting obligation as for the national authorities of the Member States.[96] Nevertheless, OLAF will still remain key institution with respect to detecting and investigating administrative irregularities, thus proving its future usefulness to the opposing voices advocating its merger with EPPO or claiming it should simply cease to exist.

It is also worth mentioning, that the Commission attempts to introduce the EPPO as „budget neutral", which means, that the officials at other EU institutions (mostly OLAF but probably also Eurojust and Europol) are being allocated to work on the establishment of the EPPO and later in the office itself, thus resulting in no extra expenditures. Therefore, a significant amount of staff in OLAF is currently focusing on the EPPO, resulting in less manpower with regards to the administrative investigations of wrongdoings.[97]

2.5.2. Eurojust (and the European Judicial Network)

2.5.2.1. Overview

2.5.2.1.1. Introduction and history

In order to establish the area of freedom, security and justice, the necessity of cooperation among Member States when tackling the most severe forms of cross-border crime was vital. Apart

[95] Personal consult with Mr. Lukáš Jelínek, OLAF employee, at the conference „Kariéra v EU aneb pracovní možnosti českých právníků" held in Prague. 23 September, 2019

[96] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'). In: *Official Journal L 283/1*. 31 October 2017. Art. 101.

[97] Personal consult with Mr. Lukáš Jelínek, OLAF employee, at the conference „Kariéra v EU aneb pracovní možnosti českých právníků" held in Prague. 23 September, 2019

from the relationship and coordination of national police authorities, the system of liaison judges and prosecutors was also introduced and encouraged, known as the European Judicial Network (hereinafter the „EJN"). The EJN consists of a number of national contact points, located at one of the Country's central institutions (mostly the respective Ministry of Justice). The main tasks of the EJN and its contact points is the encouragement, facilitation and supervision of judicial cooperation of the Member States in criminal matters, as well as organisation of joint judicial trainings.[98]

Nevertheless, even though the „active intermediaries" system proved useful and provided significant help in terms of inter-state cooperation in criminal matters, the need for establishment of a special central agency focused on judicial cooperation was more and more apparent, hence leading to the foundation of Pro-Eurojust (on the initiative of France, Belgium, Sweden and Portugal), which was eventually transformed into Eurojust by way of Council Decision 2002/187/JHA in 2002.[99] The hastened establishment of Eurojust was strongly influenced by the horrific events of 9/11 in the United States, calling for immediate supranational cooperation especially, but not only, with respect to fighting terrorism.[100] In 2018, the then Council Decision was replaced by the European Parliament and Council Regulation on the European Union Agency for Criminal Justice Cooperation (Eurojust), applicable from December 2019 (which, among other changes, grants Eurojust legal personality).[101] Article 85 TFEU provides the primary law basis for Eurojust.[102]

2.5.2.1.2. Main tasks

Eurojust is an independent agency of the EU focused on strengthening, promoting and facilitating cooperation among national judicial authorities, coordinating cross-border prosecutions and investigations, as well as it has the competence to initiate investigation or recommend to initiate prosecution. Eurojust's remits are, however, curbed, as it may act only with

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[98] AMBOS, K. *European Criminal Law*. Cambridge: Cambridge University Press. 2018. doi: 10.1017/9781316348628. p. 569.

[99] AMBOS, K. *European Criminal Law*. Cambridge: Cambridge University Press. 2018. doi: 10.1017/9781316348628. p. 569, 570.

[100] EUROJUST. *European Union Agency for Criminal Justice Cooperation., eurojust.europa.eu.* [online]. Available at: http://www.eurojust.europa.eu/about/background/Pages/history.aspx

[101] REGULATION (EU) 2018/1727 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA. In: *Official Journal L 295/138*. 21 November, 2018.

[102] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU). In: *Official Journal C 326/01*. 26 October, 2012. Art. 85

respect to a limited list of severe criminal offences. Moreover, the crime at hand must affect two or more Member States in order for Eurojust to possess the authority.[103]

2.5.2.1.3. Eurojust's remits

Regarding the serious, cross-border crimes, which are subject to Eurojust's authority, the Eurojust Regulation provides for a complete list in its Annex 1, contrary to the approach in the previously valid and applicable Eurojust Decision, which only referred to the Europol's competences. Worth mentioning are the crimes of terrorism, drug trafficking, organised crime, money laundering, human trafficking and immigrant smuggling, illicit trafficking of all kinds (such as firearms), corruption, crime against the financial interests of the EU and various types of severe financial crime (fraud, insider trading, etc.). With respect to other types of criminal conduct, Eurojust is permitted to assist only if so requested by any Member State. At last, the same initiative from the Member State is essential, if Eurojust is to facilitate cooperation between the state in question and a non-member state, as well as a cooperation agreement or a crucial interest on the provision of assistance must exist additionally.[104]

2.5.2.1.4. Structure and competences

Eurojust consists of the national members, the College, the Executive Board and the Administrative Director.[105] The most wide range of powers belongs to the individual national members – they may facilitate and act with respect to mutual legal assistance or recognition, set up a joint investigative team (hereinafter the „JIT") or be part of one, and establish contact or exchange information with all pertinent EU, national or international stakeholders. Currently, every Member State nominates one national representative to Eurojust. Furthermore, many of the national members are being supported by Deputy national members or Assistants, as well as it is important to take into account the existence of so-called liaison prosecutors, who are allocated to Eurojust by non-EU states, which, however, closely cooperate with Eurojust (as of today, 6liaison

[103] AMBOS, K. *European Criminal Law*. Cambridge: Cambridge University Press. 2018. doi: 10.1017/9781316348628. p. 570.

[104] REGULATION (EU) 2018/1727 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA. In: *Official Journal L 295/138*. 21 November, 2018. Art. 3 and 54.

[105] REGULATION (EU) 2018/1727 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA. In: *Official Journal L 295/138*. 21 November, 2018. Art. 6.

prosecutors were assigned to Eurojust from Ukraine, United States, Norway, Switzerland, North Macedonia and Montenegro).[106]

The College, on the other hand, is tasked with taking decisions with respect to strategical planning, as well as it elects the President and Vice-president of Eurojust. Mr. Ladislav Hamran of Slovakia was elected President in 2017, and national members of Italy and Germany, Filippo Spiezia and Klaus Meyer-Cabri are currently acting as Vice-presidents. Both Executive Board and Administrative Director shall act in the administrative matters; the Executive Board in the strategical, long-term ones, Administrative Director, on the other hand, shall take care of the day-to-day administrative issues.[107]

2.5.2.1.5. Eurojust in figures

Eurojust, as well as other EU agencies, issues an annual report in which the performance of the office is addressed.[108] In the sole year of 2018, Eurojust provided platform for cooperation in more than 6500 investigations, which is a number steadily growing every year. Furthermore, around 200 JITs received support from Eurojust, as well as the issuance of roughly 700 European Arrest Warrants and 1000 European Investigation Orders. Last but not least, Eurojust expanded significantly in terms of third countries relations; new contact points were established in Armenia, Iran, Nigeria, South Africa and Mauricius, achieving the tenure of contact points in almost 50 countries. Moreover, new cooperation agreement was entered into with Albania (the total number of cooperation agreements therefore amounts to nine), and two liaison prosecutors, from North Macedonia and Ukraine, were assigned to Eurojust for the first time ever,[109] making the total number of liaison prosecutors six.[110]

The constant growth in all areas of interest, be it number of coordinated investigations, supported EU investigative measures or cooperation with non-EU states, provides sound basis for

[106] EUROJUST, European Union Agency for Criminal Justice cooperation. [online]. *Liaison Prosecutors*. [cit. 13/12/2019]. Available at: http://www.eurojust.europa.eu/about/structure/college/Pages/liaison-magistrates.aspx

[107] EUROJUST, European Union Agency for Criminal Justice cooperation. [online]. *National Members*. [cit. 13/12/2019]. Available at: http://www.eurojust.europa.eu/about/structure/college/Pages/national-members.aspx

[108] EUROJUST. *Annual report 2018.* Hague: EUROJUST, 2019. In: QP-AA-19-001-EN-C. ISBN: 978-92-9490-253-5.

[109] EUROJUST. *Annual report 2018.* Hague: EUROJUST, 2019. In: QP-AA-19-001-EN-C. ISBN: 978-92-9490-253-5.

[110] EUROJUST. *Annual report 2018.* Hague: EUROJUST, 2019. In: QP-AA-19-001-EN-C. ISBN: 978-92-9490-253-5.

the conclusion, that Eurojust is not losing its purpose; quite the contrary, the EU is clearly going to need such coordinating institution even after the establishment of the EPPO.

2.5.2.2. Relationship between Eurojust, EJN and EPPO

With respect to Eurojust, the aforementioned Art. 86 TFEU stipulates, that the EPPO may be established „from Eurojust".[111] Such wording implies the idea of the European Prosecutor growing from Eurojust and inevitably „swallowing" its competences and substituting it afterwards. Nevertheless, Art. 85 still provides for the mission and tasks of Eurojust, clearly stating, that it is even further accounted for in the framework of judicial cooperation in criminal matters. The main reason and argument for not merging both of the institutions (or dissolving Eurojust) is their very different nature – while Eurojust is a facilitating, supporting agency, the EPPO aims on the investigation and prosecution of particular crimes itself. Furthermore, Eurojust's decision, unlike the acts of EPPO, lack the authority to bound national stakeholders. Lastly, the tight bond between members of Eurojust's College and their home country could have been a significant threat to the EPPO, in case the two bodies would merge into one.[112]

2.5.3. Europol

2.5.3.1. Overview

2.5.3.1.1. Introduction and history

The very first remark in the primary law as regards Europol was in the Maastricht Treaty in 1992, which envisaged its creation. However, establishment of a European Police Office required sufficient amount of time, and therefore a temporary institution was created – the European Drugs Unit (hereinafter the „EDU"). The EDU's scope of competences initially included drug-related crime only, however, it was significantly extended in the following years. The main task of the Unit was to improve cooperation between the national law enforcement entities as well

[111] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU). In: *Official Journal C 326/01*. 26 October, 2012. Art. 86

[112] SPIEZIA, Filippo. The European Public Prosecutor's Office: How to Implement the Relations with Eurojust? *Eucrim* [online]. 2018, 2, 130-137. [cit. 16/12/2019]. Available at: https://eucrim.eu/articles/the-european-public-prosecutors-office-relations-with-eurojust/

as to provide a platform for more effective exchange of information. Those main tasks remained vital in case of Europol as well, which started its operations in July 1999.[113]

In 2009, the Council adopted a Decision (Council Decision of 6 April 2009) establishing European Police Office.[114] This Council Decision replaced previously applicable Europol Convention (and among other changes granted Europol legal personality).[115]As of today, Europol's legal basis consists of primary law grounds (Art. 88 TFEU), from which the Europol Regulation stems, adopted in 2016, which also made the aforementioned Decisions further inapplicable and replaced them.[116]

Europol is the EU's law enforcement agency. However, one must bear in mind, that the office does not actually have any police officers, but rather functions as a source, „pool" of information and criminal expertise, which are available to the national law enforcement authorities.[117] Furthermore, Europol also coordinates and provides support to the operations (operatives) of national authorities.[118]

Europol together with Eurojust, OLAF and EPPO (as soon as it is established) form the institutional framework for judicial cooperation in criminal matters and fight against serious, organised crime and terrorism.

2.5.3.1.2. Main tasks

Europol's core tasks are explicitly stipulated in Art. 4 of Europol Regulation, ranging from the most important ones, such as collection, analysis and exchange of pertinent information, participation in JITs, or coordination of operational actions, to the ones with more administrative

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[113] AMBOS, K. *European Criminal Law*. Cambridge: Cambridge University Press. 2018. doi: 10.1017/9781316348628. p. 563.

[114] Council Decision of 6 April 2009 establishing the European Police Office (Europol). In: *Official Journal L 121/37*. 15 May, 2009.

[115] AMBOS, K. *European Criminal Law*. Cambridge: Cambridge University Press. 2018. doi: 10.1017/9781316348628. p. 564.

[116] AMBOS, K. *European Criminal Law*. Cambridge: Cambridge University Press. 2018. doi: 10.1017/9781316348628. p. 564.

[117] Lecture on Eurojust (and plans for EPPO) given by Mr. Pavel Zeman (incumbent Supreme Public Prosecutor of the Czech Republic) at the Faculty of Law, Charles University in Prague.

[118] EUROPEAN COMMISSION. *Ec.europa.eu., European Police Office (Europol)*. An official website of the European Union [online]. [cit. 22/12/2019]. Available at: https://europa.eu/european-union/about-eu/agencies/europol_en

or facilitating nature, which are, however, as essential as the previous ones. Moreover, Europol shall provide trainings, support with regard to exchange of criminal information intra-EU (between the Member States), and analysis as well as threat assessment in order to establish EU's priorities and efficient allocation of resources in tackling and combating crime.[119] Please note, that regarding training of law enforcement officials, a separate EU body exists for those purposes – the European Union Agency for Law Enforcement Training (CEPOL).[120]

Furthermore, Europol was also granted the rapidly expanding area of cybercrime,[121] and in order to fight this new, fast-developing form of crime more efficiently, it established the European Cybercrime Centre in 2013.[122]

2.5.3.1.3. Organisational Structure

Chapter III of the Europol Regulation stipulates its organisational structure.[123] The office is headed by the Executive Director (incumbent is Catherine De Bolle), accompanied by her three deputies. The institution then comprises of three branches – Operations Directorate, Governance Directorate and Capabilities Directorate.[124]

Furthermore, the Management Board of Europol also plays a crucial role in the framework of the institution, mostly in terms of internal documentation and long-term strategical decisions.[125]

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[119] Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA. In: *Official Journal L 135/53*. 24 May, 2016 Art. 4

[120] CEPOL. *European agency for law enforcement training* [online]. CEPOL: 2017 [cit. 26/11/2019]. Available at: https://www.cepol.europa.eu/

[121] Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA. In: *Official Journal L 135/53*. 24 May, 2016 Art. 4

[122] EUROPOL. *European Union Agency for Law Enforcement Cooperation.Europol Cybercrime Centre*. [online]. 2020 [cit. 25/12/2019]. Available at: https://www.europol.europa.eu/about-europol/european-cybercrime-centre-ec3

[123] Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA. In: *Official Journal L 135/53*. 24 May, 2016 Art. 9

[124] EUROPOL. *About Europol*. [online].: 2019 [cit. 16/12/2019]. Available at: https://www.europol.europa.eu/about-europol

[125] Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA. In: *Official Journal L 135/53*. 24 May, 2016 Art. 11

2.5.3.1.4. Europol in figures

Europol provides support for an enormous number of 40 000 investigations every year[126] and employs almost 1300 staff (mostly from Spain and the Netherlands). Moreover, Europol also deploys more than 200 liaison officers to various countries and agencies worldwide, as well as there is a vast number of such officers assigned by other stakeholders to Europol (majority from the United States and their authorities).[127]

2.5.3.2. Relationship between Europol and the EPPO

As of today, no agreement dealing with mutual relationship of both institutions was concluded. However, the EPPO Regulation governs the issue at least in general – the EPPO shall be provided with information from at its request, as well as to use Europol's analytical support teams.[128] Moreover, Europol itself has issued a document concerning possibilities regarding future relations of the two bodies. EPPO ought to be actively supported in its investigations, and Europol therefore introduced three areas of their possible mutual cooperation: investigations, requests for information and cooperation with Europol's analysis work files.[129]

2.5.4. Court of Justice of the European Union

The CJEU's primary goal, unlike the previous authorities, is not any form of cooperation or coordination in criminal matters. Therefore, the EPPO's and CJEU's jurisdiction do not overlap, however, it is essential to account for the Court's competences with regard to judicial review of the EPPO's acts nonetheless.

This issue is addressed in Art. 42 of the EPPO Regulation, which establishes the CJEU's jurisdiction over disputes arising from compensation of damage caused by the EPPO, disputes

[126] EUROPOL. *About Europol*. [online].: 2019 [cit. 16/12/2019]. Available at: https://www.europol.europa.eu/about-europol

[127] Statistics Europol https://www.europol.europa.eu/about-europol/statistics-data

[128] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'). In: *Official Journal L 283/1*. 31 October 2017. Art. 102

[129] EUROPOL. *Europol Public Information, Potential Cooperation between the European Public Prosecutor's Office and Europol.* [online]. 2019. [cit. 16/12/2019]. Available at: https://www.eerstekamer.nl/eu/documenteu/_potential_cooperation_between_the/f=/vjldbwqw9g80.pdf

regarding staff and arbitration clauses, as well as the Court shall have the competence in the matter of dismissal of European Prosecutors, including European Chief Prosecutor.[130]

Furthermore, the CJEU shall provide preliminary rulings, in light of Art. 267 TFEU[131] as regards validity and interpretation of procedural acts of the EPPO.[132]

3. Particular National Prosecution Systems

3.1. Prosecutors

Fair and just system of criminal justice is one of the cornerstones of a democratic state based on the rule of law, as we know it today. Nevertheless, who should play the key role in this crucial fight against crime and for justice? Almighty judges, as we have seen in the past, or should the major role be played by police? Nowadays, more academics than ever before agree, that one of the most essential actors, if not the most important at all, in the current criminal law systems, are the prosecutors. Be it Japan, United States or Germany, prosecutors hold large variety of powers and competences, as well as they bear greater responsibility for the outcomes. Therefore, in a unique introduction of a brand new, cross-national prosecutor, which as of today affects the criminal law systems of 22 European Union states, the role of prosecutor in the bigger criminal justice framework is of utmost importance. That is why in this part of the thesis an assessment of current role of prosecutors throughout different national jurisdictions, as well as possibilities for amendments and a conclusion with respect to the European Public Prosecutor's Office, will be made.

Furthermore, a special focus will be devoted to the issue of diverse approaches towards prosecution of serious financial crime among the chosen countries. The EPPO's material competence currently covers crimes damaging the financial interests of the Union, and as many countries' administrations have opted for a unique, separate authority to investigate and prosecute this type of offences, I consider it essential to focus more on this matter further below.

[130] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'). In: *Official Journal L 283/1*. 31 October 2017. Art. 42

[131] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU). In: *Official Journal C 326/01*. 26 October, 2012. Art. 267

[132] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'). In: *Official Journal L 283/1*. 31 October 2017. Art. 42

3.2. Germany

3.2.1. Introduction

The German Federal Republic („*Bundesrepublik Deutschland*"), is with no doubt considered one of the most essential representatives of the continental legal system, if not the most important at all. Furthermore, as this thesis focuses on the comparison of the EPPO, a body with two-level structure, with other states' prosecution systems, Germany, as a federation, provides a unique option to look closely on a similar combination of centralised and decentralised (resp. federal and state) system with regards to prosecutors.

Unlike jurisdictions, in which prosecutors face harsh criticism for being "too tough" and blindly abiding the deep-rooted mantra of winning, such as Japan or the United States, Germany faces quite the opposite problem. Reluctance to bring charges, mostly, but not only, in high-profile financial crime and corruption cases, as well as tendency to defer prosecution and enter into German form of Deferred Prosecution Agreements (confession agreements) with large-scale enterprises to the prosecutors' disadvantage, comprise most of the complaints of the dissatisfied voices.[133]

Moreover, even though the two (somewhat opposing) basic legal systems with respect to criminal proceedings worldwide, adversarial and inquisitorial, tend to somewhat converge in majority of developed jurisdictions, Germany is one of the best examples of the latter. The adversarial principle, strongest in the common law countries such as the US, provides for judges acting as mere arbitrators between two opposing parties: the public prosecutor and the defendant (representing the accused). The competitive nature and two separate parties standing one against another each with their own arguments are essential in order to ultimately achieve the truth pursuant to this doctrine. On the other hand, the inquisitorial principle, associated traditionally mostly with continental legal systems, such as Germany, grants much more powers and competences to the judges, making them the key actors in the trial. Moreover, crucial role of the pre-trial phase, which is designed to prevent as many innocents to face trial as possible, represents

[133] LANGER, M. and SKLANSKY, D. A. *Prosecutors and Democracy: A Cross-National Study*. Cambridge: Cambridge University Press (ASCL Studies in Comparative Law). 2017. doi: 10.1017/9781316941461. p. 139

another important feature of the inquisitorial doctrine compared to the adversarial one, in which shall the whole decision-making fall under the main trial.[134]

Furthermore, the two abovementioned systems then differ significantly with regard to the role of a public prosecutor in the criminal proceedings framework. The adversarial system, in which contradiction of the parties is being stressed as a core feature, the prosecutor advocates a one-sided opinion only, trying his best to bring arguments against the accused. However, every German public prosecutor shall act both in the interest of state, as well as of the accused one, effectively searching for pieces of evidence and building up arguments to support both causes.[135] Such a description of the prosecutor then defines, apart from other features, the inquisitorial doctrine.[136]

3.2.2. Organisation

At first, in order to describe and properly understand German system of public prosecution offices, it is crucial to address the general country's system of administration and governance.

Federal Republic of Germany (*Bundesrepublik Deutschland*) consists of 16 federal states (*Bundesländer*), from which three (Berlin, Hamburg and Bremen) are the so-called "city states" (*Stadtstaaten*). Those federal states execute certain level of autonomy in diversified areas based on the applicable laws. Apart from the states and their respective administrations, the country has its own federal institutions, same as other developed democratic countries based on the rule of law. Key role is being played by the federal government (*Bundesregierung*).[137]

So much for a swift introduction and overview; how is it with the prosecution offices then? Justice is first and foremost a matter assigned to the states, not to the federal administration. Therefore, only one federal public prosecutor's office exists in Germany - the Federal Office of

[134] UNODC, United Nations Office on Drugs and Crime. Organised crime, *Adversarial versus inquisitorial Legal Systems*. 2018 [online]. [cit. 17/12/2019]. Available at: https://www.unodc.org/e4j/en/organized-crime/module-9/key-issues/adversarial-vs-inquisitorial-legal-systems.html

[135] BRÖDER, Julia. How public prosecutors work in Germany. In: *deutschland.de* [online]. 2019 [cit. 17/12/2019]. Available at: https://www.deutschland.de/en/topic/politics/how-public-prosecutors-work-in-germany

[136] UNODC, United Nations Office on Drugs and Crime. Organised crime, *Adversarial versus inquisitorial Legal Systems*. 2018 [online]. [cit. 17/12/2019]. Available at: https://www.unodc.org/e4j/en/organized-crime/module-9/key-issues/adversarial-vs-inquisitorial-legal-systems.html

[137] Lecture given by prof. Angelo Golia, expert in Comparative Constitutional Law and an associate of Max-Planck Institute for Comparative Public Law and International Law, Heidelberg. November 27th, 2019. Heidelberg University.

the Prosecutor.[138] It is led by the Federal Public Prosecutor (*Generalbundesanwalt*)[139] and is located in the city of Karlsruhe. The federal prosecution is granted strictly defined competences, mainly in the area of crimes against the state (such as terrorism or treason) and against humanity (such as war crimes). Moreover, the Federal Public Prosecutor shall represent the state by the Federal Court of Justice ("*Bundesgerichtshof*"), located in Karlsruhe as well (in fact, the full name of the office is "*Generalbundesanwalt beim Bundesgerichtshof*" translating as the Federal Public Prosecutor by the Federal Court of Justice, describing one of its core competences in its very name)[140]. The chief of the office is firstly nominated by the federal Minister of Justice, who needs to obtain the approval of one of the German Parliament chambers, the "*Bundesrat*", and is afterwards appointed by the president.[141]

Furthermore, there are the state level prosecutors, who were granted much more powers, and the vast majority of crimes being committed in the country fall under their jurisdiction. Those operate with absolute independence towards the federal prosecution office, however, every one of the sixteen separate state prosecution structures fall under the respective state's Ministry of Justice (since every federal state has its own government as well). Unlike the federal level appointment procedure, in majority of the states belongs the responsibility to appoint head of the state's public prosecution, the General Public Prosecutor ("*Generalstaatsanwalt*") to the sole authority of the Minister of Justice. Only in few states is the General Prosecutor suggested by a special judicial committee first.[142]

Apart from the powers with regard to nomination and appointment, the Ministry of Justice wields numerous competences, which allow it to issue guidelines, prepare budget, manage promotions and affect the public prosecution structure significantly.[143] This system obviously

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[138] Generalbundesanwalts beim Bundesgerichtshof. In: *generalbundesanwalt.de* [online]. [cit. 18/12/2019]. Available at: https://www.generalbundesanwalt.de/de/index.php

[139] FORMANN, G., *Der Generalbundesanwalt beim Bundesgerichtshof, Kompetenzen und Organisation der Bundesanwaltschaft zwischen Bundestaat und Gewaltenteilung*. Verlag Dr. Kovac. 2004. ISBN: 3830014163. p 78

[140] Generalbundesanwalts beim Bundesgerichtshof. In: *generalbundesanwalt.de* [online]. [cit. 18/12/2019]. Available at: https://www.generalbundesanwalt.de/de/index.php

[141] LANGER, M. and SKLANSKY, D. A. *Prosecutors and Democracy: A Cross-National Study*. Cambridge: Cambridge University Press (ASCL Studies in Comparative Law). 2017. doi: 10.1017/9781316941461. p. 144

[142] LANGER, M. and SKLANSKY, D. A. *Prosecutors and Democracy: A Cross-National Study*. Cambridge: Cambridge University Press (ASCL Studies in Comparative Law). 2017. doi: 10.1017/9781316941461. p. 144

[143] LANGER, M. and SKLANSKY, D. A. *Prosecutors and Democracy: A Cross-National Study*. Cambridge: Cambridge University Press (ASCL Studies in Comparative Law). 2017. doi: 10.1017/9781316941461. p. 144

raises severe concerns with respect to their independence and immunity to political pressure; the matter will be specifically addressed further below.

The prosecution offices are, however, also hierarchically ordered. The structure comprises of 116 offices located at each single one of the Regional Courts and 25 more by the Higher Regional Courts (those are then directly subordinated to the state's Ministry of Justice).[144] Additionally, there is the Federal Prosecutor's Office as well, which was referred to above.

Lastly, as regards competences, the competence of a public prosecutor's office mirrors the material jurisdiction of the respective court.[145]

3.2.3. Selection of the prosecutors

German law schools operate on the basis of somewhat different system in comparison to other legal education standards: students are being enrolled for a five-year long Master program with no Bachelor in the interim straight from high school (mostly from one type of high school, German *Gymnasium*). In order to become not only a public prosecutor, but also a judge,[146] it is required to pass two separate and unique state exams. The first one follows right after finishing the studies – the First State Examination in Law ("*Erste Juristische Prüfung"*) and consists of written assignments as well as tests and an oral part.[147] The First Exam is further divided into a unified state part containing the major subjects, such as civil law and criminal law (around 70% of the final mark) and the other one, which is in the discretion of every particular university and should focus on special law branches, such as antitrust law or European law (roughly 30% of the mark). Upon passing this exam, an option of working as an in-house lawyer in basically all companies

[144] SIEGISMUND, Eberhard. *The public prosecution office in Germany: legal status, functions and organisation*. [online]. 2003. [cit. 18/12/2019] Available at: https://www.unafei.or.jp/publications/pdf/RS_No60/No60_10VE_Siegismund2.pdf

[145] Gerichtsverfassungsgesetz in der Fassung der Bekanntmachung vom 9. Mai 1975 (BGBl. I S. 1077), das zuletzt durch Artikel 3 des Gesetzes vom 12. Dezember 2019 (BGBl. I S. 2633) geändert worden ist. In: *Bundesgesetzblatt Part I p. 1077*. Par. 150

[146] SIEGISMUND, Eberhard. *The public prosecution office in Germany: legal status, functions and organisation*. [online]. 2003. [cit. 18/12/2019] Available at: https://www.unafei.or.jp/publications/pdf/RS_No60/No60_10VE_Siegismund2.pdf

[147] INTERNATIONAL BAR ASSOCIATION. *How to qualify as a lawyer in Germany*. [online]. IBA: 2016 [cit. 20/12/2019]. Available at: https://www.ibanet.org/PPID/Constituent/Student_Committee/qualify_lawyer_Germany.aspx

becomes available, whereas in order to become a member of a legal profession, the second state exam has to be passed as well.[148]

In case the graduate is successful, the next step is a training period focused on practical skills, rather than on theoretical knowledge. The training amounts up to three years (from which half a year takes the second state exam and preparation for it). The second state exam then consists once again from a written and oral part (examinations, assignment and analysis of a case file), and is the final requirement in order to become a prosecutor (or a judge).[149]

Both examinations in question are widely considered (not only in Germany, but also abroad) to be extremely demanding.

The journey to become a prosecutor described above must be undertaken by every applicant who seeks to become a member of this legal profession. Nevertheless, for the top-tier jobs, such as the Federal Public Prosecutor or the General Public Prosecutor, an appointment by the Minister of Justice is required in addition (combined with the approval of *Bundesrat* and appointment by the President in case of the Federal Public Prosecutor).[150]

3.2.4. Independence and relationship with other state powers and institutions

A lifetime tenure, a privilege and one of the guarantees of immunity to political pressure and independence, is being enjoyed by the German prosecutors, unlike, for example, their American counterparts (who are being elected for a certain period of time). However, on the opposite stands the subordination of the prosecution under the Ministry of Justice, casting shadow of a doubt over the institution's independence.[151]

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[148] INTERNATIONAL BAR ASSOCIATION. *How to qualify as a lawyer in Germany*. [online]. IBA: 2016 [cit. 20/12/2019]. Available at: https://www.ibanet.org/PPID/Constituent/Student_Committee/qualify_lawyer_Germany.aspx

[149] SIEGISMUND, Eberhard. *The public prosecution office in Germany: legal status, functions and organisation*. [online]. 2003. [cit. 18/12/2019] Available at: https://www.unafei.or.jp/publications/pdf/RS_No60/No60_10VE_Siegismund2.pdf

[150] LANGER, M. and SKLANSKY, D. A. *Prosecutors and Democracy: A Cross-National Study*. Cambridge: Cambridge University Press (ASCL Studies in Comparative Law). 2017. doi: 10.1017/9781316941461. p. 144

[151] LANGER, M. and SKLANSKY, D. A. *Prosecutors and Democracy: A Cross-National Study*. Cambridge: Cambridge University Press (ASCL Studies in Comparative Law). 2017. doi: 10.1017/9781316941461. p. 142

Furthermore, once again contrary to the United States (which are a federation as well), since the prosecutors in Germany are unelected officials, they need not to strive for the office in the form of a political campaign.[152]

Moreover, the position of public prosecution in German institutional as well as constitutional framework remains a central matter of lively debate among respective legal scholars. Since the prosecutors do not act one-sided against the accused only, but rather gather evidence and make arguments proving both his or her guilt or innocence, the similarity and proximity to the judges is quite evident. However, the superior position of the Ministry of Justice on both federal and state level strongly suggests, that the public prosecution's place is in the executive branch.[153]

3.2.4.1. Relationship with judicial power

"The public prosecution office shall be independent of the courts in the performance of its official tasks."[154] Plain and simple, that is what the German Courts Constitution Act (*Gerichtverfassungsgesetz*) states in its Section 150. Combined with the following section, which forbids prosecutors to perform any functions in the judiciary, as well as supervision of the judicial branch in any manner,[155] the intention of the lawmaker to strictly separate public prosecution and the courts is rather clear.

Furthermore, the law does not provide for an obligation to prosecute all cases, in which the prosecutor holds enough evidence, but rather only majority of felonies (there is the principle of mandatory prosecution in German law, however, so many exceptions have been introduced from it, that only most of the felonies were left.).[156] That leaves the prosecutors with certain discretionary powers in majority of the matters, further fuelling the idea of the prosecutor somewhat acting as a "second judge".

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[152] LANGER, M. and SKLANSKY, D. A. *Prosecutors and Democracy: A Cross-National Study*. Cambridge: Cambridge University Press (ASCL Studies in Comparative Law). 2017. doi: 10.1017/9781316941461. p. 142

[153] LANGER, M. and SKLANSKY, D. A. *Prosecutors and Democracy: A Cross-National Study*. Cambridge: Cambridge University Press (ASCL Studies in Comparative Law). 2017. doi: 10.1017/9781316941461. p. 141

[154] Gerichtsverfassungsgesetz in der Fassung der Bekanntmachung vom 9. Mai 1975 (BGBl. I S. 1077), das zuletzt durch Artikel 3 des Gesetzes vom 12. Dezember 2019 (BGBl. I S. 2633) geändert worden ist. In: *Bundesgesetzblatt Part I p. 1077*. Par. 150

[155] Gerichtsverfassungsgesetz in der Fassung der Bekanntmachung vom 9. Mai 1975 (BGBl. I S. 1077), das zuletzt durch Artikel 3 des Gesetzes vom 12. Dezember 2019 (BGBl. I S. 2633) geändert worden ist. In: *Bundesgesetzblatt Part I p. 1077*. Par. 151

[156] LANGER, M. and SKLANSKY, D. A. *Prosecutors and Democracy: A Cross-National Study*. Cambridge: Cambridge University Press (ASCL Studies in Comparative Law). 2017. doi: 10.1017/9781316941461. p. 140

3.2.4.2. Relationship with executive power

German public prosecution system is under strong supervision of the federal Ministry of Justice. This rather unique, apparent attempt to violate the prosecution's independence dates back to the 19th century, when a clash of the pro-royal and liberal groups resulted in withdrawing the prosecution authority from the judiciary and placing it as a single office, later under the oversight of the Ministry. In fact, apart from telling particular prosecutors, how to approach and solve particular case, the Ministry of Justice is granted basically every competence there is in relation to the prosecutors (e.g. issuance of guidelines, oversight and budget), making them subordinate to the Ministry. However, such a hierarchy colludes with the apolitical nature of the German prosecutor, bound only by valid laws.[157]

Even though the superior position of the Ministry may suggest some extent of dependence of the prosecutors on the government, such fears have, in majority of situations, not been realized so far. Same applies with regard to certain level of political pressure on them. [158] However, prosecutors are bound by the instructions issued by the Ministry (or via the General Public Prosecutors) nonetheless. Those instructions only provide for general guidance though.[159]

The prosecution is therefore considered by most of the academia to be somewhere in the middle between the executive and judiciary, drawing some of its nature from both branches and also providing a link between those two.[160]

3.2.5. Specialization (prosecution of financial crimes)

Unlike France, which established numerous special anti-corruption bodies in recent years, Germany did not introduce a single one.

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[157] LANGER, M. and SKLANSKY, D. A. *Prosecutors and Democracy: A Cross-National Study*. Cambridge: Cambridge University Press (ASCL Studies in Comparative Law). 2017. doi: 10.1017/9781316941461. p. 141-142

[158] LANGER, M. and SKLANSKY, D. A. *Prosecutors and Democracy: A Cross-National Study*. Cambridge: Cambridge University Press (ASCL Studies in Comparative Law). 2017. doi: 10.1017/9781316941461. p.143

[159] LANGER, M. and SKLANSKY, D. A. *Prosecutors and Democracy: A Cross-National Study*. Cambridge: Cambridge University Press (ASCL Studies in Comparative Law). 2017. doi: 10.1017/9781316941461. p.149

[160] SIEGISMUND, Eberhard. *The public prosecution office in Germany: legal status, functions and organisation*. [online]. 2003. [cit. 18/12/2019] Available at: https://www.unafei.or.jp/publications/pdf/RS_No60/No60_10VE_Siegismund2.pdf

The authorities responsible for investigating economic crime consist of prosecutors ("*Staatsanwalt*"), police ("*Polizei*") and tax authorities ("*Steuerfahndung*").[161]

The hierarchy of the prosecution offices was already addressed above, however, concerning financial crime and corruption, the interest shall be more on the internal structure. Every office is led by an individual – a Public Prosecutor General (or Chief Senior Public Prosecutor in case of the offices established by respective Regional Courts). Moreover, the office is further structured into divisions such as sexual offences, juvenile crime, general division, or financial crime.[162]

Economic crime unit (or financial crime or anti-corruption division) is the German alternative for an independent body aimed at tackling fraud and other forms of economic criminal offences. Compared to other special divisions, the financial crime one is distinguished by complex, demanding cases, as well as associated significantly higher level of training required. Furthermore, due to the complexity of the problematics, experts from diversified fields are also essential in order to solve some of the cases at hand.[163]

As for the police, economic crime is being investigated, based on its gravity, either by local police offices, or by the State Office for Criminal Investigation in case of most severe offences. Furthermore, a separate body exists to tackle tax-related offences – the tax investigation authorities. [164]

At last, financial crime is closely linked with the issue of criminal liability of legal persons. Currently, the PIF Directive does not strictly oblige Member States to introduce criminal liability of legal entities - Art. 6 of the Directive simply states, that the liability for the criminal offences in question must be ensured by the Member States.[165] Therefore Germany, as well as a few other states, opted only for the administrative liability, which is (in Germany) represented by the

[161] HERNÁNDEZ-GARCÍA, R. *Anticorruption Laws and Regulations, A Global Guide*, Globe Law and Business. 2018. ISBN: 9781787421172. p. 194

[162] SIEGISMUND, Eberhard. *The public prosecution office in Germany: legal status, functions and organisation*. [online]. 2003. [cit. 18/12/2019] Available at: https://www.unafei.or.jp/publications/pdf/RS_No60/No60_10VE_Siegismund2.pdf

[163] SIEGISMUND, Eberhard. *The public prosecution office in Germany: legal status, functions and organisation*. [online]. 2003. [cit. 18/12/2019] Available at: https://www.unafei.or.jp/publications/pdf/RS_No60/No60_10VE_Siegismund2.pdf

[164] HERNÁNDEZ-GARCÍA, R. *Anticorruption Laws and Regulations, A Global Guide*, Globe Law and Business. 2018. ISBN: 9781787421172., p. 194

[165] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law. In: *Official Journal L 198/29*. 28 July, 2017. Art. 6

Administrative Offences Act („*Ordnungswidrigkeitengesetz*“) and the fines thereof. However, latest development in German politics shows, that the criminal liability is currently more likely to be introduced than ever before.[166]

3.2.6. Inspiration with regard to the EU and EPPO

German prosecutors are sometimes perceived as too soft with regard to convictions and crime punishment. On the other hand, in other jurisdictions, such as the United States, prosecutors are infamous for their zealotry and determination to get every single petty thief behind bars and to achieve conviction rate as high as possible. In my opinion, the current EU administration shall strive to evade both extremes, as they are not fit for an equal and just society. Furthermore, it is currently unknown in which direction will the EPPO go, as many observers doubt the real impact of the fledging office, however, a strong Chief European Prosecutor may, on the contrary, aim at proving the significance of the office far too fiercely.

Moreover, the EU should determine, whether the EPPO and its prosecutors are going to act more based on the adversarial or inquisitorial principle. Since the adversarial is much more common in Anglo-American jurisdictions and majority of EU countries are therefore unfamiliar with it, I would personally recommend to lean towards the inquisitorial one. I also think, that the idea of a “second judge” is much more in favour of egalitarian proceedings, than a clash of two hostile parties.

Since Germany officially considers itself as a federation and EU bears most of the features of one as well, I consider it advisable to draw inspiration from the organisational point of view of the prosecution offices as well. At first, the overall approach towards distribution of the competences between a central body and offices on state level (either German *Bundesländer* or European countries) works well in case of Germany and is, in my opinion, going to work well in case of the EU too. Furthermore, with respect to competences of the central office, it would be advisable to extend the powers of the EPPO to crimes against the state and humanity, pursuant to the German standard. Those extremely severe crimes definitely cause a cross-boarder impact and shall therefore be included in the competences of the EPPO. However, even though the Federal Public

[166] DANNECKER, G. The protection of the financial interests of the EU in Germany – The responsibility of enterprises. *Criminal Law Aspects of the Protection of the Financial Interests of the EU with particular emphasis on the national legislation on tax fraud, corruption, money laundering and criminal compliance with reference to cybercrime*. Wolters Kluwer Hngary Kft., 2019. p. 74 and following

Prosecutor in Germany acts for the federation at the Supreme Court, I think it is not advisable to adopt any such amendments in case of the EPPO, as EU already has its own "attorney" to represent it before the CJEU – the European Commission.

I would also suggest more central selection of the prosecutors for the EPPO, making the appointment process more transparent, but also determining a particular level of expertise for all of the prosecutors, thus increasing their overall quality and ensuring coherence. This might be achieved by way of unified entrance exams (same as in Germany – the two state examinations), which would prevent extreme differences in terms of knowledge and experience to occur among prosecutors of different countries. A unified training shall be also provided for the prosecutors working under the EPPO (in order to ensure same level of expertise of all prosecutors as well). Suggestions for unified exams and training could help preventing serious gaps between the expertise of prosecutors from different countries as well as to reach certain common level of quality.

In terms of independence, I think that there is no need to implement the German prosecutors' benefit of lifetime tenure of office. The main reason behind it is that the independence of the EPPO is ensured by the office not being subordinate to any other EU agency or institution. On the contrary, German public prosecution offices fall directly under the respective Ministry of Justice, which calls for a balancing measure to restore the independence (in the form of lifetime appointment).

Prosecutors in the Federal Republic of Germany can neither supervise courts and the judges nor perform their functions. Furthermore, unlike e.g. in France, they are not closely bound together with the judiciary by sharing the same premises or having identical after-graduation training. Same applies in case of the EPPO and the CJEU, which are strictly separated with respect to competences, offices, trainings as well as other aspects. In my opinion, such clear and strict separation of prosecution and judiciary is highly beneficial in terms of trustworthiness towards any democratic state based on the rule of law, and therefore shall be kept this way.

The EPPO, as well as German prosecutors assigned to the diverse financial crime special divisions, both require a sort of special treatment due to the unique complexity of the cases they are required to solve. As for the prosecutors from German special economic crime units, a recent trend has been to bring along various experts to the teams (such as from banking and finance or

audit sectors), or provide the prosecutors with sufficient continuous trainings from other fields apart from criminal law only. This approach is highly recommended in case of the EPPO as well. Furthermore, separate entrance criteria shall be required in case of financial-crime oriented prosecutors regardless of the territory in order to achieve as high level of expertise as possible.

Moreover, Germany does not have its own special body to investigate and prosecute financial crime, but rather divisions focused on economic crime and corruption inside of the general prosecution offices. I personally think, that a separate institution better serves the purpose and may more efficiently ensure proper and swift detection and prosecution of the offences in question, mostly due to the complexity and rarity of the cases. Therefore, I am of the opinion, that the EPPO is, regarding this matter, a step in the right direction, since it currently holds the competences to prosecute crimes affecting the financial interests of the EU only. However, if the situation changes, and the powers of the EPPO are extended beyond just protection of financial interests, there should be always at least a special economic crime division created or separated in the framework of the office. Such a measure would help preserve some level of autonomy and expertise for the prosecutors of financial crime.

3.3. France

3.3.1. Introduction

At first, it is crucial to note, that in case of France, which is together with Germany the most essential representative of the continental law system, there is an unprecedented similarity and tight relationship between the judges and the prosecutors. Even a legal amateur would be able to notice a major difference between the other jurisdictions in question and France in terms of the trial itself – in a courtroom, the prosecutors enjoy a spot on the raised platform right next to the judges, leaving the defendants and victims beneath, clearly stating the prosecutor‘s dominant role in the proceedings as well as the blur line between them and the judges.[167] Furthermore, in terms of symbolism, prosecutors and judges used to enter and leave the courtroom by the same door, which, however, remains an abandoned practice nowadays.[168]

[167] LANGER, M. and SKLANSKY, D. A. *Prosecutors and Democracy: A Cross-National Study*. Cambridge: Cambridge University Press (ASCL Studies in Comparative Law). 2017. doi: 10.1017/9781316941461. p. 109

[168] LANGER, M. and SKLANSKY, D. A. *Prosecutors and Democracy: A Cross-National Study*. Cambridge: Cambridge University Press (ASCL Studies in Comparative Law). 2017. doi: 10.1017/9781316941461. p. 116

However, apart from these rather symbolic trifles, other features of the French system also point to a unique status of the prosecutors compared to their position in other legal systems regarding the relation between judgeship and prosecution. The prosecutors and judges may transfer freely between each other's posts throughout their whole legal career, as well as they receive the very same type of judicial trainings and education prior to their office tenure. Moreover, common budget, workplace and administrative staff at their disposal make it even more difficult to tell the difference between those two legal professions. At last, the sole fact, that prosecutors as well as judges are considered „*magistrats*"[169] („*magistrats du siége*" for judges and „*magistrats de parquet*" for prosecutors)[170], shows how intertwined those two institutes are in case of France.

Furthermore, an institutional framework similar to the one in Germany exists in France as well, since the French prosecution offices are subordinate to the Ministry of Justice too, [171] which is on the contrary a structural framework speaking in favour of the prosecution falling under the executive branch.

3.3.2. Organisation

The French prosecution branch is represented by the Office of the Prosecutor, which consists of the General Prosecutor's Office, around 40 appellate prosecutor's offices and almost 160 district prosecutor's offices,[172] acting as „*Procureur de la République*" in first-level trials or as „*Procureur général*" in case of appellate courts or a special Supreme court proceedings (General Prosecutor's Office).[173]

3.3.3. Selection of the prosecutors

As the journey of a prosecutor begins with his selection, the process of choosing or appointing them crucially requires to be as unbiased, professional, transparent and non-politicized

[169] LANGER, M. and SKLANSKY, D. A. *Prosecutors and Democracy: A Cross-National Study*. Cambridge: Cambridge University Press (ASCL Studies in Comparative Law). 2017. doi: 10.1017/9781316941461. p. 109

[170] ENCYCLOPAEDIA BRITANNICA. *France, Justice*. [online]. [cit. 20/12/2019]. Available at: https://www.britannica.com/place/France/Justice

[171] MINISTÈRE DE LA JUSTICE. *French Legal System*. [online]. 2012 [cit. 21/12/2019]. p. 8. Available at: http://www.justice.gouv.fr/art_pix/french_legal_system.pdf

[172] TALEB, Akila et AHLSTRANDT, Thomas. *The public prosecutor, its role, duties and powers in the pre-trial stage of the criminal justice process – a comparative study of the french and the swedish legal systems*. In: Dans Revue internationale de droit pénal. 2011. p. 523 – 540.

[173] MINISTÈRE DE LA JUSTICE. *French Legal System*. [online]. 2012 [cit. 21/12/2019]. p. 8. Available at: http://www.justice.gouv.fr/art_pix/french_legal_system.pdf

as possible. In case of France, the path begins with an entrance exam, which young law graduates have to pass in order to be enrolled in the Judiciary School („*École nationale de la magistrale*“)[174] located in Bordeaux.[175] The exam consists of written essay and an oral part, and aspires to be as equal and neutral as possible. However, critics claim, that it is often based on what only the white middle-class perceives as equality, effectively discriminating people of lower class or different races.[176]

In this special education program, the attendants acquire knowledge essential in order to perform the role of a judge as well as a prosecutor. Furthermore, even after successfully mentoring young lawyers along their journey to judgeship or prosecution office, the Judiciary School takes care of their education and trainings even further, throughout their whole career. Moreover, it shall ensure cross-border conferences and cooperation in various forms of trainings.[177]

After successful graduation, there is no other immediate consequent selection process; the *magistrats* rather choose their particular vacancy based on their preference, results and availability.[178] The choosing of top-tier prosecutors, in which a special judiciary body or the French cabinet is active, is a matter addressed further below.

3.3.4. Independence and relationship with other state powers and institutions

The prosecutors in general consider themselves to be part of the judiciary. However, even though they have much in common with the judges, a strong link with the executive, mostly the Ministry of Justice, is quite apparent as well.[179] Furthermore, French prosecutors are known for their proximity to police officials in the course of criminal investigation.[180]

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[174] LANGER, M. and SKLANSKY, D. A. *Prosecutors and Democracy: A Cross-National Study*. Cambridge: Cambridge University Press (ASCL Studies in Comparative Law). 2017. doi: 10.1017/9781316941461. p. 113

[175] TALEB, Akila et AHLSTRANDT, Thomas. *The public prosecutor, its role, duties and powers in the pre-trial stage of the criminal justice process – a comparative study of the french and the swedish legal systems*. In: Dans Revue internationale de droit pénal. 2011. p. 523 – 540.

[176] LANGER, M. and SKLANSKY, D. A. *Prosecutors and Democracy: A Cross-National Study*. Cambridge: Cambridge University Press (ASCL Studies in Comparative Law). 2017. doi: 10.1017/9781316941461. p. 113

[177] MINISTÈRE DE LA JUSTICE. *French Legal System*. [online]. 2012 [cit. 21/12/2019]. Available at: http://www.justice.gouv.fr/art_pix/french_legal_system.pdf

[178] LANGER, M. and SKLANSKY, D. A. *Prosecutors and Democracy: A Cross-National Study*. Cambridge: Cambridge University Press (ASCL Studies in Comparative Law). 2017. doi: 10.1017/9781316941461. p. 113

[179] LANGER, M. and SKLANSKY, D. A. *Prosecutors and Democracy: A Cross-National Study*. Cambridge: Cambridge University Press (ASCL Studies in Comparative Law). 2017. doi: 10.1017/9781316941461. p. 110

[180] LANGER, M. and SKLANSKY, D. A. *Prosecutors and Democracy: A Cross-National Study*. Cambridge: Cambridge University Press (ASCL Studies in Comparative Law). 2017. doi: 10.1017/9781316941461. p. 4

As well as in other jurisdictions, the issue of hierarchal accountability and oversight of prosecutors must be addressed. Unlike the judges, who enjoy a privilege of managing their affairs via a special body called the High Council of the Judiciary („*Conseil superiér de la magistratu*re"), by prosecutors, the Ministry of Justice plays the key role. So while for the dismissal, promotion, or nomination of a judge, an independent institution consisting of 20 members elected from the best representatives of judiciary exists and has a final word in such matters, this High Council of the Judiciary plays much less significant role with regards to the prosecutors. The High Council acts only with regard to lower-level prosecutors appointment, however, the top-tier prosecutors are being chosen and appointed by the French Cabinet of Ministers.[181] In fact, the French prosecutors themselves acknowledge and admit, that it is the Ministry of Justice, who passes the decisions of nomination or disciplinary matters among prosecutors. Moreover, such an obvious dependency of the prosecution on the executive does not remain unnoticed, and therefore has the current subordination system been subject to severe criticism from the European Court of Human Rights.[182]

Even though the hierarchy structure is somewhat rigid in comparison with the other pertinent jurisdictions, the French prosecution system tends to balance those constraints by way of more excessive discretion powers. Unlike in the common law legal systems, neither the Chief prosecution bodies nor the Ministry of Justice issue any kind of specific policies, guidelines or recommendations, which would instruct the prosecutors as to how to react, mostly when they ought to bring charges or indict (especially in unclear cases occurring repeatedly).[183] The only documents issued by the Ministry are the general "penal policies" with defined objectives to achieve.[184]

3.3.4.1. Relationship with judiciary power

As already mentioned above, the close relationship between prosecutors and judges is in case of France crystal clear. French members of judiciary even admit, that apart from working in

[181] LANGER, M. and SKLANSKY, D. A. *Prosecutors and Democracy: A Cross-National Study*. Cambridge: Cambridge University Press (ASCL Studies in Comparative Law). 2017. doi: 10.1017/9781316941461. p. 114

[182] LANGER, M. and SKLANSKY, D. A. *Prosecutors and Democracy: A Cross-National Study*. Cambridge: Cambridge University Press (ASCL Studies in Comparative Law). 2017. doi: 10.1017/9781316941461. p. 113-114

[183] LANGER, M. and SKLANSKY, D. A. *Prosecutors and Democracy: A Cross-National Study*. Cambridge: Cambridge University Press (ASCL Studies in Comparative Law). 2017. doi: 10.1017/9781316941461. p. 3-4

[184] LANGER, M. and SKLANSKY, D. A. *Prosecutors and Democracy: A Cross-National Study*. Cambridge: Cambridge University Press (ASCL Studies in Comparative Law). 2017. doi: 10.1017/9781316941461. p. 117

the same premises and with the same staff, a judge and prosecutor working on a case might even intentionally get neighbouring offices, in order to help them fasten and ease the criminal proceedings. Obviously, such a collaborative environment casts doubts on the overall transparency and justice of the trial's outcome.[185]

Not only does such proximity raise questions with respect to the legitimacy of the proceedings, but it also poses practical obstacles in terms of management. For example, the courts offices being shared by both types of the „*magistrats*" means, that both a chief prosecutor and a chief judge are equally responsible for the government of this particular institution, and therefore must mutually agree on all decisions taken. Such a duality often leaves the court paralyzed, when both of the chief court's „managers" prioritize only their respective branch.[186]

3.3.4.2. Relationship with executive power

In order to determine the ties and hierarchy of prosecutors with regard to executive, a basic understanding of the executive branch in France in general is crucial. As France is the most well-known example of a semi-presidential republic, the executive is represented and headed both by the President and the Prime minister.[187] President is voted directly, and he, among other competences, wields the power to appoint the Prime Minister, who acts as the chief representative of the Government (including the Minister of Justice).[188]

Both President and Prime Minister represent the executive, however, pursuant to the French Constitution, only the president is obliged to ensure the independence of the judiciary.[189]

Regarding prosecutors, all of them are subordinate to the incumbent Minister of Justice, as well as to their superiors in the framework of the prosecution internal hierarchy.[190] This highly

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[185] LANGER, M. and SKLANSKY, D. A. *Prosecutors and Democracy: A Cross-National Study*. Cambridge: Cambridge University Press (ASCL Studies in Comparative Law). 2017. doi: 10.1017/9781316941461. p. 115

[186] LANGER, M. and SKLANSKY, D. A. *Prosecutors and Democracy: A Cross-National Study*. Cambridge: Cambridge University Press (ASCL Studies in Comparative Law). 2017. doi: 10.1017/9781316941461. p. 116

[187] MINISTÈRE DE LA JUSTICE. *French Legal System*. [online]. 2012 [cit. 21/12/2019]. p. 3. Available at: http://www.justice.gouv.fr/art_pix/french_legal_system.pdf

[188] Constitution of October 4 1958 (Constitution du 4 octobre 1958). Version consolidée au 20 janvier 2020. Art. 5, 8 and 20

[189] Constitution of October 4 1958 (Constitution du 4 octobre 1958). Version consolidée au 20 janvier 2020. Art. 64

[190] MINISTÈRE DE LA JUSTICE. *French Legal System*. [online]. 2012 [cit. 21/12/2019]. p. 8. Available at: http://www.justice.gouv.fr/art_pix/french_legal_system.pdf

hierarchical structure dates back as long as to the age of Napoleon, who substituted their rather independent prosecution predecessors by more bureaucratically-oriented ones.[191]

3.3.5. Specialization (prosecution of financial crimes)

In some of the jurisdictions, which are subject to assessment and comparison in my thesis, it is not only the prosecutors drafting indictments and bringing people to trial. As serious crime shifts and changes rapidly in the modern, globalised world, so do the ways to tackle it and to respond to it, be it the law enforcement or prosecution.

Therefore, in 2013 France introduced its special anti-corruption body, focused on serious financial and economic crime, called the French Financial Prosecution Office („*Parquet National Financier*", hereinafter the „PNF"), which started its operations in 2014.[192] Moreover, apart from a special prosecution office, France runs the French Anti-corruption Agency („*Agence Française Anticorruption*", hereinafter the „AFA") as well.[193]

As for the competences of the PNF, they are stipulated in the Code of Criminal Procedure and consist of a wide, diversified range of criminal conduct: bribery and corruption, misappropriation, money laundering, serious tax fraud (including VAT fraud), insider trading, manipulation of price, or spreading false information about the market.[194] The institution itself employs almost 40 experts, consisting of *magistrats* equipped with necessary expertise and experience relevant for this type of criminal investigations, special advisors and clerks.[195]

On the other hand, the AFA, introduced as late as in 2016 along with other major anti-corruption amendments in the piece of legislation known as Sapin II, started operating in 2017. Contrary to the PNF, it does not wield any prosecution powers, but rather is focused on prevention and compliance programs as well as auditing the implementation of those. Furthermore, not only public institutions are subject to the obligations and audits of the AFA, but also large private enterprises. Therefore, the private sector's participation in the fight against corruption and misuse

[191] LANGER, M. and SKLANSKY, D. A. *Prosecutors and Democracy: A Cross-National Study*. Cambridge: Cambridge University Press (ASCL Studies in Comparative Law). 2017. doi: 10.1017/9781316941461. p. 117
[192] French Anti-Corruption Agency. *Annual report 2017*. Paris: AFA, Ministère de la Justice. 2018
[193] French Anti-Corruption Agency. *Annual report 2017*. Paris: AFA, Ministère de la Justice. 2018
[194] Code of Criminal Procedure (Code de la Procedure Pénale). *Version consolidée au 1 janvier 2020*. Sec.705 to 705-5
[195] MINISTÉRE DE LA JUSTICE. *Tribunal de Paris, Organization*. [online]. [cit. 22/12/2019]. Available at: https://www.tribunal-de-paris.justice.fr/75/organization

of public funds is ensured. The AFA is governed by the Minister for Government Action and Public Accounts as well as the Minister of Justice.[196]

The third body forming the so-called „anti-corruption triangle" is the High Authority for Transparency in Public Life (hereinafter the "HATVP"). This institution, established following the „Cahuzac scandal", during which the French Budgetary Minister lied about owning a bank account abroad,[197] is responsible for the overall integrity and transparency, and was granted for these purposes powers mostly with respect to control and prevention.[198] However, it is authorised to use certain investigative measures too, as well as it has the competence to submit documents to the court in order to initiate a criminal prosecution.[199] The Authority addresses issues of lobbying, declarations of assets and similar affidavits, advises other public stakeholders in the matters of transparency and ethics and deals with various conflicts of interests (existing or threatening).[200] The High Authority was established together with PNF in 2013.[201]

Finally, with regards to French fight against aggravated financial and economic crime, one must mention the two (in)famous laws providing for the anti-corruption legal cornerstone – Sapin I and Sapin II. Both of the laws are named after Michel Sapin, who served as the French Minister for Economic Affairs and finance in the years 1992-1993 as well as from 2014-2017.[202] Sapin I was introduced as soon as in 1993[203] in order to improve transparency, tackle corruption and address the issue of political parties' financing. The law subsequently established two new bodies aimed at achieving those goals. Even though France adopted this important piece of anti-corruption legislation quite early, and furthermore signed the OECD Anti-Bribery Convention later on, the fight against financial crime and corruption still remained reluctant. Following the above-

[196] French Anti-Corruption Agency. *Annual report 2017*. Paris: AFA, Ministère de la Justice. 2018

[197] SCHOFIELD, Hugh. Cahuzac scandal threatens Hollande's presidency [online]. In: *BBC.com*. Paris 2013. [cit. 23/12/2019] Available at: https://www.bbc.com/news/world-europe-22030839

[198] The High Authority for transparency in public life. [online]. *The creation of the High Authority*. 2016 [cit. 23/12/2019] Available at: https://www.hatvp.fr/en/high-authority/institution/list/#the-creation-of-the-high-authority

[199] Network for Integrity. [online]. *The High Authority for Transparency in Public Life*. [cit. 23/12/2019] Available at: http://www.networkforintegrity.org/continents/europe/the-high-authority-for-transparency-in-public-life/

[200] Network for Integrity. [online]. *The High Authority for Transparency in Public Life*. [cit. 23/12/2019] Available at: http://www.networkforintegrity.org/continents/europe/the-high-authority-for-transparency-in-public-life/

[201] NEWCOMB, Quinton et LOPEZ, Olivier. *Sapin I to Sapin II – French anti-bribery law, an evolution* [online]. Fulcrum Chambers. 2017 [cit. 25/12/2019]. Available at: https://fulcrumchambers.com/wp-content/uploads/2017/05/sapin-french-anti-bribery-law.pdf

[202] The Economist. *The new government*. [online]. Paris, 2014. [cit. 25/12/2019] Available at: https://www.economist.com/charlemagne/2014/04/02/the-new-government

[203] HERNÁNDEZ-GARCÍA, R. *Anticorruption Laws and Regulations, A Global Guide*, Globe Law and Business. 2018. ISBN: 9781787421172. p.166

mentioned „Cahuzac affair“, PNF and HATVP began their operations, however, notwithstanding the new authorities, law enforcement with regards to financial criminal conduct was insufficient anyway.[204]

Therefore, a core legislation was drafted, by coincidence under the supervision of Michel Sapin again, drawing inspiration mostly from the US Foreign Corruption Practices Act (the „FCPA“) and the UK Bribery Act (the „UKBA). Named originally Sapin II, this brand new act imposed more obligations on companies, mostly preventive measures aimed at preventing corruption, money laundering and fraud from happening in the first place. Therefore, such compliance programmes, which are mandatory for every mid-scale to large-scale company (at least 500 employees and annual turnover more than 100 mil. EUR, or if the parent company fulfils such criteria), are from now on explicitly defined. A sound whistleblowing system, Code of Conduct, KYC (Know your customer) due diligence procedure or Risk management are among the key features of the newly defined compliance measures to be implemented. Moreover, the AFA was formed from an older authority, and the criminal offence of bribery of foreign public officials was included in French criminal law in order to comply with the OECD Convention. Furthermore, Sapin II considerably extends French jurisdiction regarding bribery offences, adjusting its legal framework to already existing extra-territorial laws of strong jurisdictions, such as the UKBA and FCPA mentioned above. [205]

3.3.6. Inspiration with regard to the EU and EPPO

Regarding the above-mentioned proximity of prosecutors and judges in France, I am of the opinion, that in case of EPPO, it is not as essential to ensure the separation of the judiciary (CJEU) and prosecution (EPPO). Since the competences of those two bodies generally do not overlap (the CJEU holds only very few powers with regard to the EPPO and protection of financial interests of the EU), the threat of concerted practice or mutual influence is quite insignificant. That, however, might change in the future with additional competences for either of the institutions.

[204] NEWCOMB, Quinton et LOPEZ, Olivier. *Sapin I to Sapin II – French anti-bribery law, an evolution* [online]. Fulcrum Chambers. 2017 [cit. 25/12/2019]. Available at: https://fulcrumchambers.com/wp-content/uploads/2017/05/sapin-french-anti-bribery-law.pdf

[205] HERNÁNDEZ-GARCÍA, R. *Anticorruption Laws and Regulations, A Global Guide*, Globe Law and Business. 2018. ISBN: 9781787421172. p.169-173

However, as for the delegated prosecutors, it is a matter of utmost importance to provide a more unified framework with respect to the judgeship-prosecution bond, so that the practice in individual Member States remains unified and does not tend to the practice common in every single country. Otherwise could the situation result in completely diverse approach towards the relationship between the respective members of the judiciary, such as the judges and delegated prosecutors being extremely close to each other in France, whereas e.g. in Slovakia they would be strictly separate. Such a state of affairs would be highly detrimental with regard to the legal expectations of citizens from different Member States – with common EU legislation (PIF Directive and EPPO Regulation), it is essential, that the situation does not differ significantly in various Member States.

As for the selection of prosecutors, the French system once again advocates more unified and central approach in case of the EPPO (same result as for Germany, see Chapter 3.2). Moreover, a rather special institution is the Judicial School, however, it would not be of any use with regard to training or education of fresh graduates, due to the nature of the EPPO, since the office is interested only in already experienced national prosecutors. Nevertheless, Judicial Academy would be a useful tool for the continuous training and education of the EPPO staff and it might be advisable to include the judiciary in it as well. Therefore, it would provide a common, shared experience and solid base for future career not only in those two institutions, but also in other EU bodies. In my opinion, it would be highly advisable to base the EU's Judicial Academy in Luxembourg, mostly due to the location of CJEU and EPPO as well as for the economies of scale. From my perspective would this Judicial Academy provide training and education only for the staff of the central offices, which would therefore lead to the exclusion of the European Delegated Prosecutors. Otherwise, the costs incurred would be extremely high. The only other option would be to establish small national branches of this Judicial Academy in every Member State, that takes part in the enhanced cooperation.

In terms of independence, the major difference is that even though both French prosecutors as well as European prosecutors are subordinate to someone else, the nature of this subordination is rather different. French prosecutors are ultimately accountable to the Minister of Justice, who is by definition part of the executive. On the other hand, European Prosecutors are accountable only to the Chief European Prosecutor, who is, pursuant to EU law, independent from any other EU institutions (this applies to the delegated prosecutors as well, they only have one more step in the chain of command towards the Chief European Prosecutor). Therefore, it is of utmost importance

to ensure the independence of the Chief European Prosecutor, so that the dependence on executive is evaded at any costs (contrary to France, which is criticized for that by the ECHR). The whole chain of prosecutors would be otherwise then threatened by dependence on another institution, stemming from the dependence of the Chief European Prosecutor. In light of the above-mentioned information, it is not as essential to grant excessive discretion powers to the European Prosecutors, since they are independent in their decision making nonetheless.

The High Judiciary Commission is another French institution, which provides inspiration for the EPPO as well, this time in terms of appointment of prosecutors (even though the Commission acts more with regard to judges than prosecutors in case of France). The core reason behind it is the distribution of decision making among various subjects of diverse institutions (from which the Commission consists), rather than concentration of power with one individual or office. However, the current appointment process in the EU also does not leave the choosing of European Chief Prosecutor on one subject only.

Supporting the conclusion already reached in case of Germany, financial crime is much more complex than other means of crime. Therefore, it is essential to have a separate independent body to tackle it (such as French PNF or the current EPPO), or at least a separate division of the prosecution (which is the German way).

Furthermore, I am of the opinion, that it would be advisable to establish a special body, inspired among others by the French AFA, which would ensure supervision of compliance programs and anti-corruption measures in case of EU large-scale corporations. This would, however, incur high costs, so it is crucial to come up with a strictly defined threshold in order to determine which companies are to be subject to the control (I would suggest turnover and/or number of employees to be the key criteria) and to ultimately include only really large enterprises on the European level. Moreover, it is important to decide, if this potential new authority would be a separate body or a part of an existing one. Since France has not one, but three anti-corruption oriented institutions (PNF, ANA and HATVP), inspiration could be drawn there. However, mostly due to extreme budget requirements associated with establishment of a new institution on the EU level, I would personally suggest only a division in the framework of EPPO focused on the compliance and anti-corruption matters.

3.4. The United States

3.4.1. Introduction

"Although not a federal state, the EU has the same problems as if it were one".[206] How accurate and very true do I find this quote, which is the first and foremost reason to compare the EU with an old, by any means successful, federation – the United States of America. Moreover, the EU itself and its institutions do not conceal their proximity with the US as well as their thrill to inspire itself by it,[207] and the same applies in the area of criminal law.[208]

Unlike in other countries subject to assessment, there is a significant difference between the prosecutors, based on their obtainment of tenure as well as federal or state belonging. The US Attorneys, political appointees, Assistant United States Attorneys (hereinafter the "AUSAs"), their assistants and unelected bureaucrats, and the District or State Attorney's, elected officials, all represent and form public prosecution in the US.[209]

Furthermore, in recent years, the US Attorneys became target of severe criticism, being called to stop the opportunistic misuse of powers aimed at achieving high conviction rates, and to promote justice and the rule of law once again instead.[210] However, due to the US institutional framework and the omnipresent proximity of prosecutors and politics (for numerous prosecutors is their office tenure only the first step to the top-tier politics), this might be a tough nut to crack.

Lastly, the extensive incarceration rate currently present in the United States is worth our concern as well, since the numbers are rather breath-taking, and the key stakeholders responsible are none other than the US prosecutors. Even though only less than 5% of world population lives in the US, more than 25% of all people worldwide are being imprisoned there (as of 2015).[211]

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[206] GÓMEZ-JARA DÍEZ, C. *European Federal Criminal Law: The Federal Dimension of EU Criminal Law*. Intersentia. 2015. doi: 10.1017/9781780684819. p. 1

[207] SCHÜTZE, Robert. *From Dual to Cooperative Federalism: The Changing Structure of European Law*. Oxford: Oxford University Press. 2009. ISBN: 9780199238583

[208] EUROPEAN PARLIAMENT, Directorate general for internal policies, Policy department, citizens´ rights and constitutional affairs. *Study report of Harmonization of criminal law in the EU*. 2010.

[209] LANGER, M. and SKLANSKY, D. A. *Prosecutors and Democracy: A Cross-National Study*. Cambridge: Cambridge University Press (ASCL Studies in Comparative Law). 2017. doi: 10.1017/9781316941461. p. 207-208

[210] LANGER, M. and SKLANSKY, D. A. *Prosecutors and Democracy: A Cross-National Study*. Cambridge: Cambridge University Press (ASCL Studies in Comparative Law). 2017. doi: 10.1017/9781316941461. p. 138

[211] YE HEE LEE, Michelle. *Yes, U.S. locks people up at a higher rate than any other country*. In: The Washington Post. [online] 2015 [cit 26/12/2020]. Available at: https://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country/

Moreover, the number of those held in prison was rising steadily and significantly in the last 40 years up until 2013, and even though the last few years a slight decrease was measured, there are still 2.2 million people in prison in the country (as of 2016).[212] The issue is so pressing, that it provided for one of the most unique sights there is, with regard to the US politics: strong support for a bill - prison reform - from both democrats and republicans.[213]

3.4.2. Organisation

At the very beginning, one must essentially note, that Offices of the US Attorneys are officially part of the Department of Justice (hereinafter the "DOJ").[214] Such proximity with the executive casts a notable shadow of a doubt over the very independence of the institution. Moreover, as mentioned above, there are various "types" of prosecutors in the US – the US Attorneys, the District or State Attorneys and the AUSAs.[215]

Regarding federal prosecutors, the American president appoints the Attorney General of the US as well as the United States Attorneys. Currently, there are 93 US Attorneys, each operating its own office, almost mirroring the federal judicial districts.[216] Moreover, there are more than 350 AUSAs,[217] who are hired by the US Attorneys in order to support them in their work.[218] The appointment and selection of both is a matter addressed further below.

As for the state prosecutors, almost every American state has an Attorney General, elected by its citizens. However, the Attorney General is mostly responsible for enforcement of non-

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[212] KANN,Drew. *5 facts behind America's high incarceration rate*. CNN. 2019 [cit. 27/12/2019]. Available at: https://edition.cnn.com/2018/06/28/us/mass-incarceration-five-key-facts/index.html

[213] ZURCHER, Anthony. *US Senate passes sweeping criminal justice reform bill*. BBC. 2018 [cit. 27/12/2019]. Available at: https://www.bbc.com/news/world-us-canada-46613564

[214] ZORNOW M, David; STRAUBER E, Jocelyn and MERZEL, Daniel. *Financial crime in the United States: overview.* In: Practical law - ThomsonReuters. [online] 2018 [cit 27/12/2020]. Available at: https://uk.practicallaw.thomsonreuters.com/7-520-6422?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1

[215] LANGER, M. and SKLANSKY, D. A. *Prosecutors and Democracy: A Cross-National Study*. Cambridge: Cambridge University Press (ASCL Studies in Comparative Law). 2017. doi: 10.1017/9781316941461. p. 207-208

[216] BARANOUSKI, Elise; RUTTENBERG, Joan AND STEIN STAFFORD, Carolyn. *The fast track to a U.S. attorney's office, by the President and Fellows of Harvard College*. [online] 2014. [cit 28/12/2020]. Available at: https://hls.harvard.edu/content/uploads/2008/06/fast-track-final.pdf

[217] GÓMEZ-JARA DÍEZ, C. *European Federal Criminal Law: The Federal Dimension of EU Criminal Law*. Intersentia. 2015. doi: 10.1017/9781780684819. p. 254

[218] GÓMEZ-JARA DÍEZ, C. *European Federal Criminal Law: The Federal Dimension of EU Criminal Law*. Intersentia. 2015. doi: 10.1017/9781780684819. p. 208

criminal policies only – such as those related to competition law (antitrust law in the US) or protection of consumers, as well as he acts as legal counsel for the state's institutions. On the other hand, the representatives elected in order to prosecute crime are the District Attorneys (or sometimes State Attorneys, depending on the particular state in question). The District Attorneys shall cover the prosecution of crimes pursuant to the state's criminal laws (which includes more criminal conduct than the federal criminal law), and in order to do so are equipped with extensive investigative and indictment powers. Moreover, they have hired staff at their disposal to support them in tackling crime and facilitate the investigations and criminal proceedings – the Assistant District (or State) Attorneys.[219]

Furthermore, a special office was established in order to provide essential support for all the US Attorneys and their offices at hand, called the Executive Office for United States Attorneys (hereinafter the "EOUSA"). Its mission comprises mainly of provision of administrative, technical as well as educational support, oversight and creation of policies. [220]

3.4.3. Selection of the prosecutors

Let us start from the very beginning; in order to be enrolled at a US law school, the student is required to have obtained a Bachelor's degree (in any field), a certain level of GPA (Grade Point Average) and sufficient LSATs score. The LSAT (Law School Admission Test) is a nation-wide, tailored examination determining the eligibility of students for admission to law schools accredited by the American Bar Association (ABA). The acceptance rate varies significantly among different law schools, so while the national average is around 45%, top law schools such as Harvard, Yale or Stanford pend around 10%.[221] One must bear in mind, that the provided figures account only for admission, however, it is even more demanding to achieve a scholarship.

After a three-year study and successful graduation, it is crucial (apart from two minor exceptions) to pass the bar examination[222] (diverse approaches towards the bar exam exist varying

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[219] GÓMEZ-JARA DÍEZ, C. *European Federal Criminal Law: The Federal Dimension of EU Criminal Law*. Intersentia. 2015. doi: 10.1017/9781780684819. p. 207

[220] DEPARTMENT OF JUSTICE. *EOUSA, Executive Office for United States Attorneys.* [online] 2019. [cit. 27/12/2020]. Available at: https://www.justice.gov/usao/eousa

[221] MOODY, Josh. *10 Law Schools That Are Hardest to Get Into* [online]. In: U.S.news. 2019 [cit. 29/12/2020]. Available at: https://www.usnews.com/education/best-graduate-schools/the-short-list-grad-school/articles/law-schools-that-are-hardest-to-get-into

[222] BARANOUSKI, Elise; RUTTENBERG, Joan AND STEIN STAFFORD, Carolyn. *The fast track to a U.S. attorney's office, by the President and Fellows of Harvard College*. [online] 2014. [cit 28/12/2020]. Available at: https://hls.harvard.edu/content/uploads/2008/06/fast-track-final.pdf

across particular states, as well as unified exams, exceptions and criticism thereof – the issue is rather complex and is not the main focus of this Thesis).[223] The admission to any bar and a law school degree together with required application documents should officially suffice in order to be eligible to be hired as an AUSA. However, in practice are the requirements far more demanding, and a great deal of extracurricular activities, internships or other experience are essential in order to be the one to fill the vacancy after all. All of those previous achievements are being thoroughly reviewed, followed by interviews for the few chosen ones. Finally, when the decision has been already made to hire an individual, the United States Attorney Offices (hereinafter the "USAOs") require their brand new colleagues to be subject to a background check by the FBI (Federal Bureau of Intelligence).[224]

Nevertheless, regarding the United States Attorneys themselves, completely different rules apply. Since the US Attorneys are, unlike the AUSAs, political nominees, they are being appointed by the President upon confirmation by the Senate for a four-year term.[225] Although a time period is stipulated in the Title 28 of the United States Code (governing Judiciary and Judicial Procedure), it is also stated, that the incumbent US Attorney will continue its tenure of office, until a successor is found and appointed.[226] Moreover, the Attorney General of the United States is also appointed by the US president.[227]

Finally, as for the District or State Attorneys, they are elected, in the majority of states for a four-year term.[228] This rather unique approach (at least compared to other assessed jurisdictions), however ensures some level of accountability to the pertinent citizens.[229]

3.4.4. Independence and relationship with other state powers and institutions

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[223] HARVARD LAW SCHOOL. *Taking the Bar Exam*. [online]. [cit. 30/12/2020]. Available at: https://hls.harvard.edu/dept/dos/taking-the-bar-exam/

[224] DEPARTMENT OF JUSTICE [online]. *U.S. Attorneys, Southern District of Texas, AUSA Application Requirements And Hiring Process*. 2015 [cit. 30/12/2020]. Available at: https://www.justice.gov/usao-sdtx/ausa-application-requirements-and-hiring-process

[225] BARANOUSKI, Elise; RUTTENBERG, Joan AND STEIN STAFFORD, Carolyn. *The fast track to a U.S. attorney´s office, by the President and Fellows of Harvard College*. [online] 2014. [cit 28/12/2020]. Available at: https://hls.harvard.edu/content/uploads/2008/06/fast-track-final.pdf

[226] Title 28 - JUDICIARY AND JUDICIAL PROCEDURE. In: T*he U.S. Government Publishing Office*. 1948 (1966 amended).

[227] GÓMEZ-JARA DÍEZ, C. *European Federal Criminal Law: The Federal Dimension of EU Criminal Law*. Intersentia. 2015. doi: 10.1017/9781780684819. p. 208

[228] *They Report to You.* [online]. 2020. [cit. 30/12/020]. Available at: https://theyreporttoyou.org/da-elections/how-they-work

[229] GÓMEZ-JARA DÍEZ, C. *European Federal Criminal Law: The Federal Dimension of EU Criminal Law*. Intersentia. 2015. doi: 10.1017/9781780684819. p. 207 and 208

3.4.4.1. Relationship with judicial power

In comparison with other jurisdictions, American prosecutors, notwithstanding if federal or state, do not suffer as much from too close bond between the prosecution and judiciary. This certainly does not mean, that the courts do not wield any powers or competences towards the prosecutors – on the contrary, judges are responsible for oversight and supervision with regard to adherence to respective criminal and other laws by the prosecution offices and its representatives.[230] It only points to and stems from the American strict separation of powers, which ensures, that the independence of prosecutors is not as threatened as in many different jurisdictions when it comes to judges – prosecutors relationship.

3.4.4.2. Relationship with executive power

US Attorneys are, unlike most of other countries' prosecutors, not only subject to supervision of the Department of Justice, but rather a direct part of it. It is the Criminal Division of DOJ, who is responsible for oversight, supervision and guidelines with regard to state and federal prosecutors.[231]

The Justice Manual, formerly the United States Attorney Manual, is a key and most essential policy issued by the DOJ concerning prosecutors. This extensive document provides crucial information for US Attorneys and the Attorney General of the US from all of their areas of interests and regarding every one of their competences. However, it does not cover prosecution on the state level, that is for the particular's state administration or District (State) Attorney to deal with. The federal laws are, on the other hand, addressed at its full, including the civil powers and responsibilities. US Attorneys may obtain information regarding antitrust matters, tax issues or civil rights, more general topics such as the organisation structure, as well as an enormous volume of information concerning criminal law. [232] The Justice Manual, however, serves only as a general guideline, and cannot fully address neither all the comprehensive issues, which may arise during the course of prosecutor's duties, nor the particular cases and their differences.

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[230] LANGER, M. and SKLANSKY, D. A. *Prosecutors and Democracy: A Cross-National Study*. Cambridge: Cambridge University Press (ASCL Studies in Comparative Law). 2017. doi: 10.1017/9781316941461. p. 288

[231] DEPARTMENT OF JUSTICE. *Department of Justice, Criminal Division*. 2019 [online]. [cit. 01/01/2020]. Available at: https://www.justice.gov/criminal

[232] DEPARTMENT OF JUSTICE. *Justice manual*. 2019. [cit. 01/01/2020]. Available at: https://www.justice.gov/jm/justice-manual

Moreover, the US Attorneys as well as the Attorney General of the United States are appointed by the president for a defined period of time,[233] which constitutes an intersection of the prosecution and executive branch as well.

3.4.5. Specialization (prosecution of financial crimes)

The US is viewed worldwide as a flagship and vigorous promoter of the fight against corruption and financial crime, with the country achieving regularly high ranking in corruption perceiving surveys, adopting an extensive number of statutes focused on tackling most serious forms of economic crime, as well as maintaining highly-developed compliance programs of the private sector stakeholders. However, due to the volume and extensive demands of the enacted laws, the current system is also subject to severe criticism, mostly by the entrepreneurs and large corporations, because it drives the costs of compliance measures and staff to incredible heights.

As for the above-mentioned laws aimed at fighting corruption and financial crime, the Foreign Corruption Practices Act (hereinafter the "FCPA") is definitely among the most infamous ones, especially due to its extraterritorial nature.[234] Regarding other pieces of legislation, worth mentioning are the Sarbanes-Oxley Act (fraud in financial reports),[235] the Hobbs Act (robbery or extortion) or the 18 USC Section 201 (domestic federal anti-bribery law).[236]

DOJ was given the supreme position over prosecution offices in the US, and it is them who are responsible for tackling most of financial crime, such as fraud, embezzlement, tax evasion or money laundering.[237] Even though the DOJ itself has a special sub-division and Deputy Director

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[233] BARANOUSKI, Elise; RUTTENBERG, Joan AND STEIN STAFFORD, Carolyn. *The fast track to a U.S. attorney's office, by the President and Fellows of Harvard College*. [online] 2014. [cit 28/12/2020]. Available at: https://hls.harvard.edu/content/uploads/2008/06/fast-track-final.pdf

[234] ARNOLD & PORTER LLP. *The Extraterritorial Reach of the FCPA and the UK Bribery Act: Implications for International Business.* [online] 2012 [cit 02/01/2020]. Available at: https://files.arnoldporter.com/advisory%20extraterritorial_reach_fcpa_and_uk_bribery%20act_implications_international_business.pdf

[235] KENTON, Will. *Sarbanes-Oxley (SOX) Act of 2002* [online]. In: Investopedia. 2019. [cit. 02/01/2020]. Available at: https://www.investopedia.com/terms/s/sarbanesoxleyact.asp

[236] HERNÁNDEZ-GARCÍA, R. *Anticorruption Laws and Regulations, A Global Guide*, Globe Law and Business. 2018. ISBN: 9781787421172. p. 391 and following

[237] ZORNOW M, David; STRAUBER E, Jocelyn and MERZEL, Daniel. *Financial crime in the United States: overview.* In: Practical law - ThomsonReuters. [online] 2018 [cit 03/01/2020]. Available at: https://uk.practicallaw.thomsonreuters.com/7-520-6422?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1

assigned to cover commercial crime,[238] there is no separate, independent institution which would focus only on the matters of financial crime. However, that is true only for the federal level, the US Attorneys. A different approach may be chosen by the states (e.g. the Financial Crime Unit in the state of Illinois).[239]

Other bodies are authorised to proceed with civil enforcement actions, such as the United States Securities and Exchange Commission (hereinafter the "SEC") or Commodity Futures Trading Commission (hereinafter the "CTFC").[240] Moreover, the DOJ is responsible for criminal prosecution on both individuals as well as companies, when it comes to the FCPA. On the other hand, the SEC is granted the powers of enforcement of civil sanctions. In practice, there have been often both criminal and civil actions pending.[241]

3.4.6. Inspiration with regard to the EU and EPPO

It would be also advisable to perform an assessment of the possibility of the EPPO's competences extension, in order to include some civil enforcement matters as well. However, with the Attorney General's most usual powers in this area – consumer protection, competition law and taxes, the EU already has developed, efficient bodies assigned to those matters, mostly in the framework of the Commission.

The American prosecutors have an elaborate system of support at their disposal – not only the AUSAs or Assistant District or State Attorneys, but also other staff hired for their prosecution offices, as well as a special office called EOUSA (providing education and training too). In my opinion shall the EPPO do the same, since every assistant position provides more time and space for the prosecutor himself to focus on his expertise and not just the administrative workload. Advisable would be not only assistants at the central level, but also on the decentralised for delegated prosecutors. I am of the opinion, that the budget costs for this extra support staff would

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[238] DEPARTMENT OF JUSTICE. *Department of Justice, Criminal Division*. 2019 [online]. [cit. 01/01/2020]. Available at: https://www.justice.gov/criminal

[239] ILLINOIS ATTORNEY GENERAL. *Assistant Attorney General - Criminal Enforcement - Special Prosecutions - Financial Crimes Unit - Chicago*. [online] 2019. [cit. 03/01/2020]. Available at: http://www.illinoisattorneygeneral.gov/about/jobs/aag_cespecfinancialcrimesunit_c.html

[240] ZORNOW M, David; STRAUBER E, Jocelyn and MERZEL, Daniel. *Financial crime in the United States: overview*. In: Practical law - ThomsonReuters. [online] 2018 [cit 03/01/2020]. Available at: https://uk.practicallaw.thomsonreuters.com/7-520-6422?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1

[241] HERNÁNDEZ-GARCÍA, R. *Anticorruption Laws and Regulations, A Global Guide*, Globe Law and Business. 2018. ISBN: 9781787421172. p. 408

be outweighed by the efficiency and cost reduction elsewhere. Furthermore, the idea of a separate educational body already inspired by France is further advocated by the EOUSA existence.

Apart from further supporting the idea of more central and unified examination for the prosecutors (as well as in case of Germany and France), the American prosecutor selection process introduces another aspect to draw inspiration from – background checks. I consider it essential, in the times hybrid threats and complex cyber conflicts, to perform at least a basic level of checks of the new European Prosecutors, as well as other staff when necessary. If possible, I would suggest Europol as the body responsible thereof, however, since it is not a full law enforcement agency but rather a source of information and operational support, it may be left on the respective national agencies.

The idea of a prosecutor directly voted by the people may become an inspiration in case of the EPPO as well, since the democratic deficit and lack of legitimacy are regularly stressed concerns of many European citizens with regard to criticism of the current EU. On the contrary, the highly politically sensitive appointment of US Attorneys by the President is, in my opinion, something to evade. Even though the selection process in the EU is much more similar to the political appointment and nominees, I think it differs significantly from the US system, since there are much more stakeholders in the whole process (the Council as well as the European Parliament both have significant number of members, who consider the candidate). Nevertheless, the direct vote of the European Chief Prosecutor is something to consider, as it would give the citizens of Member States the grip of power and a feeling, that they can really be of influence.

Not only mere subordination of the American prosecutors, but rather a part of the DOJ means, that the independence is significantly threatened. On the other hand, no such relationship currently exists with regard to the courts, which is an advantage and something to maintain even in case of the EPPO. The US Attorneys operate being guided by the Justice Manual, an extensive, thoroughly drafted document covering all aspects of their work. Such guidelines shall be definitely available for the prosecutors of the European office as well, so it is advisable to either include such information in the forthcoming Rules of Procedure, or to draft a separate document.

The diversification of institutions aimed at fighting financial crime and corruption in the US (DOJ, CTFC, SEC and others) is something to take into account for the EPPO as well, however, mostly in case of possible future extension of its competences (then it might be advisable to

establish a special body e.g. on securities). Apart from that provides the American FCPA an interesting feature to consider – the extraterritoriality of its laws. It is more of a foreign policy issue than the question of effectivity – is it essential to act as a geopolitical hegemon, spreading the ideas of democratic society and rule of law by extension of your jurisdiction as well as to facilitate improvement of anti-corruption environment? Or is it more important to support the businesses and spare them the extra costs of another law to comply with?

3.5. Japan

3.5.1. Introduction

The reasons for choosing an Asian country's prosecution system to be compared with the EPPO are numerous: at first, I consider it essential to include a country from the economically and politically strong region of Asia-Pacific in the framework of my research in order to get more comprehend results in the very end. Furthermore, Japan almost mirrors the EU as well as the US in terms of values and foreign policy, which means there is the option of learning something from its legal as well as other systems. The difference to other countries considered, is that we are able to do that without the necessity of immense caution, unlike e.g. China, with respect to which it would be much more demanding to compare any legal institutes due to the overall authoritarian regime (some level of caution is obviously crucial when it comes to comparison with Japan or other countries nonetheless). Mostly, however, have I chosen Japan because of its uniqueness and interestingness from the historical and legal point of view. Japan's combination of German law and continental legal principles, which they embraced along the history, pierced with the significant influence of the US following the Allies victory in the Second World War, provides a rare example of combination of both continental and common law systems cohabitating side by side. At last, the competences and powers, which the prosecutors wield, considerably exceed the measures available for prosecutors in different jurisdictions.

Furthermore, one must bear in mind, that the position and status of a Japanese prosecutor (*kenji*), is significantly stronger than in other relevant jurisdictions, and many consider this fact to be the first and foremost reason for an unprecedently low crime rate, and, on the other hand, high conviction rate in Japan. However, such a powerful authority of the prosecutor brings about the other side of the coin too, casting doubts on the prejudgement of the prosecutors when deciding to bring charges or indict, as well as raising serious questions with regard to interrogations, which

tend to be, according to numerous separate testimonies, exhausting and biased. Furthermore, the stunning 99 % conviction rate stems mostly from high number of confessions, which once again raises doubts as regards the overall justice of the system, in which prosecutors recklessly pressure suspects to confess rather than searching for the just truth.[242] However, the reluctance to prosecute cases, that are unlikely to end up with a judgment of conviction, plays a significant role as well.[243]

Moreover, Japanese prosecutors, unlike prosecution offices in other assessed countries, put great value on the issue of victim protection and help. Contacts, guides and key information are provided by every possible means, and even though the Japanese are in general considered to be more officially than really polite and helpful, the concern of the public officials towards victims is quite apparent and omnipresent.[244]

3.5.2. Organisation

In Japan, the public prosecution branch comprises of four levels of respective offices: the Supreme Public Prosecutor's Office (Tokyo), eight High Public Prosecutor's Offices (Tokyo, Osaka, Nagoya, Hiroshima, Fukuoka, Sendai, Sapporo and Takamatsu), District Public Prosecutor's Offices (capitals of each prefecture) and Local Public Prosecutor's Offices (municipal level).[245] The system of prosecutor's offices mirrors the court organisation system, with the only difference being the existence of Summary and Family courts instead of Local ones.[246] However, in reality, prosecutors themselves often act as judges in an interim stage called *kessaikan* (which is the first and foremost reason for the extremely low number of acquittals, since they only proceed with cases highly likely to end up with a conviction).[247]

Furthermore, an elite Special Investigation Division, "*Tokusobu*", aimed at tackling the most serious forms of crime (especially corruption-related), operates in parallel with the general

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[242] ADELSTEIN, Jane. *Is international scrutiny of Japan's criminal justice system fair*?. [online]. In: The Japan Times. 2019 [cit. 07/12/2020]. Available at: https://www.japantimes.co.jp/news/2019/01/05/national/media-national/international-scrutiny-japans-criminal-justice-system-fair/#.XcnYlflKjIV

[243] RAMSEYER, J. Mark and RASMUSEN, Eric B. *Why Is the Japanese Conviction Rate So High*? In: The Journal of Legal Studies 30(1):53-88. USA, 2001. DOI: 10.1086/468111

[244] MINISTRY OF JUSTICE. *For the Victims of Crime*. [online]. Japan. 2019 [cit. 09/12/2020]. Available at: http://www.moj.go.jp/content/001253049.pdf

[245] MINISTRY OF JUSTICE. *The Public Prosecutors Office and the Course of Criminal Proceedings*. [online]. Japan. 2019 [cit. 09/12/2020]. Available at: http://www.moj.go.jp/ENGLISH/CRAB/crab-02-1.html

[246] JAPAN FEDERATION OF BAR ASSOCIATIONS. *The japanese juducial system*. [online]. JFBA, 2019. [cit. 09/12/2020]. Available at: https://www.nichibenren.or.jp/en/about/judicial_system/judicial_system.html

[247] JOHNSON T. D. *The Japanese Way of Justice, Prosecuting Crime in Japan*. Oxford University Press. 2002. ISBN: 9780195119862. p. 226

prosecution branch. Those divisions are located at the District Public Prosecution Offices in Tokyo, Osaka and Nagoya.[248]

3.5.3. Selection of the prosecutors

One would hardly find a developed country, in which litigations are as hard to come by as in Japan, stemming mostly from the non-dispute Japanese environment. Nevertheless, even though the percentage of attorneys per inhabitant is therefore lower compared to the other analysed countries (especially to the US) this does not apply neither to judges nor to prosecutors.[249]

With one of the worldwide lowest crime rates (measured by number of intentional homicides on 100,000 people)[250], the need for prosecutors and crime judges appears not as imminent, one might argue. However, as already mentioned above, the powers and numbers of prosecutors are most likely the main reason for this Japanese success, and therefore the government maintains sufficient number of their ranks.

Attorneys, judges and prosecutors, representing the three essential legal professions of Japan (as well as of most other countries), are all required to pass the National Bar Exam (*Shihoshiken*) – an exam only available after successfully graduating from law school. However, the small percentage of passers cannot practice law or become part of the judiciary straight away[251], but are only admitted to a one-year training period in the Legal Research and Training Institute (hereinafter the "LRTI"), supervised by the Japanese Supreme Court.[252]

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[248] SAEKI, Hitoshi; JIN, Hiroaki; YOKOTA, Yozo. *Prosecution Reform Initiatives in the Past Three Years, The Principles of Prosecution and Practice.* [online]. 2014. [cit. 13/12/2020]. Available at: http://www.kensatsu.go.jp/content/001142803.pdf

[249] KAMIYA, Setsuko. *Scales of justice: Legal system looks for right balance of lawyers*. In: Japan Times. [online]. 2008. [cit. 14/12/2019]. Available at: https://www.japantimes.co.jp/news/2008/03/18/reference/scales-of-justice-legal-system-looks-for-right-balance-of-lawyers/#.XiTjD75KjIU

[250] THE WORLD BANK. *UN Office on Drugs and Crime's International Homicide Statistics database, Intentional homicides (per 100,000 people)*. 2019. The World Bank Group.

[251] CHEN, Edward I. *The National Law Examination of Japan*. In: Journal of Legal Education, vol. 39, no. 1, 1989. p. 1

[252] SUPREME COURT OF JAPAN *The Legal Training and Research, Institute of Japan*. [online]. 2006. [cit. 14/12/2019]. Available at: http://www.courts.go.jp/english/institute_01/institute/index.html

The LRTI is responsible for training of all legal professionals, and comprises of two branches – one focused on improving the skills of judges and assistant judges, the other aimed at training of "legal apprentices".[253]

The first branch not only provides joint, introductory, general or special legal trainings for judges and assistant judges, but rather also introduces the option of their secondment in a particular private company for a limited period of time.[254]

With regard to the legal apprentices, a one-year mandatory training following the successful pass of the National Bar Exam is essential in order to become an assistant judge, a public prosecutor, or an attorney. The training is based mostly on practical skills, which are considered to be insufficient from law schools, and consists of field as well as collective forms of training. After the successful completion of the training period, one might finally become, apart from the other legal professions, a public prosecutor.[255]

3.5.4. Independence and relationship with other state powers and institutions

3.5.4.1. Relationship with judicial power

As mentioned above, the court structure almost mirrors the prosecution one (the only difference being the existence of Summary and Family courts compared to the Local Public Prosecutor's Offices).[256]

In case of criminal trials, the clash between the common and civil law approaches is rather imminent - up until 1943, a jury was deciding on the guilt, if the accused renounced his right to appeal. However, since then the system operated solely on the grounds of civil law customs, letting professional judges decide all criminal cases.[257] The breaking point came as late as in in 2009 with the introduction of the "lay judges" (*saiban-in*). Often being mistaken for a jury, those judges from

[253] SUPREME COURT OF JAPAN *The Legal Training and Research, Institute of Japan*. [online]. 2006. [cit. 14/12/2019]. Available at: http://www.courts.go.jp/english/institute_01/institute/index.html
[254] SUPREME COURT OF JAPAN *The Legal Training and Research, Institute of Japan*. [online]. 2006. [cit. 14/12/2019]. Available at: http://www.courts.go.jp/english/institute_01/institute/index.html
[255] SUPREME COURT OF JAPAN *The Legal Training and Research, Institute of Japan*. [online]. 2006. [cit. 14/12/2019]. Available at: http://www.courts.go.jp/english/institute_01/institute/index.html
[256] THE SECRETARIAT OF THE JUDICIAL REFORM COUNCIL. *The Japanese Judicial System* [online]. 1999. [cit. 16/12/2019]. Available at: https://japan.kantei.go.jp/judiciary/0620system.html
[257] WATSON, A. *Popular Participation in Japanese Criminal Justice, From Jurors to Lay Judges*. In: Palgrave Advances in Criminology and Criminal Justice in Asia. 2016. p. 7

the common people shall together with professional judges determine the guilt or innocence of the accused. The introduction of the *saiban-in* system strives to bring justice closer as well as to make it more familiar to the public.[258] And notwithstanding the unmeasurable impact on the citizens' legality and legitimacy perception, the involvement of public is quite remarkable – since the introduction of the system, more than 53 000 Japanese citizens took on the role of a lay judge in the proceedings (until October 2016).[259]

More importantly, however, there is an interesting trend common to both prosecutors and judiciary. In case of courts, after the grievous and demanding journey to becoming a judge by way of passing the National Bar Exam and undertaking the obligatory training at LRTI, a junior judge is assigned to one of the country's courts. Nevertheless, even at the very beginning, vacancies and courts differ significantly with regard to their attractivity. The very best candidates, measured, among other criteria, by the time they needed to pass the exams after graduation, end up at the most prestigious court (from the judge fledglings' perspectives): the Tokyo District Court. But the assignment, be it a win or a loss for the young judges, does not last forever. In general, every three years the Supreme Court Secretariat (which resolves matters regarding the appointment of judges as well, even though the officially responsible institution is the Cabinet of Japan) assigns judges to new positions among diverse courts throughout the country and the judicial hierarchy.[260] This way, be it an intention of the lawmakers or not, cannot the prosecutors and judges form strong friendships and bonds, such as e.g. in France, even though they share the same education and initial training.

3.5.4.2. Relationship with executive power

A strong relationship between the public prosecution and, as in case of majority of other jurisdictions, the Ministry of Justice exists in Japan. A Cabinet consisting of various ministers (including Minister of Justice) is the core pillar of the executive power in Japan, and is accountable only to the *Diet* (Japanese Parliament).[261]

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[258] THE MINISTRY OF JUSTICE, JAPAN. *Saiban-in System*. [online]. 2019, MOJ [cit. 19/12/2019]. Available at: http://www.moj.go.jp/ENGLISH/m_hisho06_00010.html

[259] KAGE, R. *Who Judges?: Designing Jury Systems in Japan, East Asia, and Europe*. Cambridge: Cambridge University Press. 2017, doi: 10.1017/9781108163606. p. 2

[260] RAMSEYER, J. Mark and RASMUSEN, Eric B. *Why Is the Japanese Conviction Rate So High*? In: The Journal of Legal Studies 30(1):53-88. USA, 2001. DOI: 10.1086/468111.

[261] UNITED NATIONS ASIA AND FAR EAST INSTITUTE. *Criminal Justice in Japan*. In: UNAFEI, For the prevention of crime and treatment of offenders. 2019.

As regards the powers towards the prosecution, the Minister of Justice is given the competence of supervision and control. However, the law strictly stipulates, that such competences are of a general nature only (e.g. issuance of guidelines), and that no direct power over an individual investigation or prosecution of a particular case might be executed. Furthermore, the Prosecutor General as well as his deputies are appointed by the government (Cabinet), and the Minister of Justice himself covers the rest.[262]

3.5.5. Specialization (prosecution of financial crimes)

Following the trend of organised crime development, Japan established the Special Investigation Division (*Tokusobu*) focused on high-profile, white-collar crime. The branches of *Tokusobu* are located in Tokyo, Osaka and Nagoya. Especially the Tokyo and Osaka offices have achieved tremendous success throughout the operating years, however, a rather recent alarming event overshadowed those achievements (at least the ones of the Osaka office), and sparked an intensive debate about the state of criminal justice and prosecution in Japan. In 2009, Atsuko Muraki worked as a senior official at the Health, Labour and Welfare Ministry, and was charged and brought to court by the Osaka District Prosecution Office. The allegations were fraud and presentation of false, misleading information, in particular enjoying a discount system for institutions employing disabled individuals, while not in fact employing any of those. However, it turned out, that the whole case against Muraki was fabricated by the Osaka prosecutors, reaching as far as to the investigators making up fake witness interrogations or uploading false information to Muraki's hardware. The sophistication and extent of the fabrication, as well as the overall approach of the prosecutors once again brought up intensive discussion regarding Japanese prosecutors and their almost unlimited powers.[263]

Following the scandal, but also in light of facing more general criticism, the Ministry of Justice introduced a comprehensive program in order to reform the prosecution services. Core part of the government program is reinforcement and reform of the Special Investigation Departments (*Tokusobu*) – organizational changes, new investigation methods or introduction of recording of the suspects' interrogations (vital in the Japanese prosecution framework, due to the extremely

[262] UNITED NATIONS ASIA AND FAR EAST INSTITUTE. *Criminal Justice in Japan*. In: UNAFEI, For the prevention of crime and treatment of offenders. 2019.

[263] OTAKE,Tomoto. Atsuko Muraki: Fighter for justice [online]. *The Japan Times*. 2011 [cit. 29/12/2019]. Available at: https://www.japantimes.co.jp/life/2011/05/01/people/atsuko-muraki/#.Xcnr-_lKjIU

high number of confessions, which are often suspected to be made under severe pressure) account for just some of the key measures included.[264]

Furthermore, with respect to applicable laws, apart from relevant provisions of Criminal Code[265] and the enactment of National Public Service Ethics Act, Japanese administration wants to help its largest firms with activities abroad as well. Therefore, Guidelines for Preventing Bribery of Foreign Public Officials were issued by the Ministry of Economy, Trade and Industry, aiming to tackle the issues of extraterritorial foreign anti-corruption laws too.[266]

3.5.6. Inspiration with regards to the EU and EPPO

The dominant position of the prosecutors provides more of a warning rather than inspiration with regard to the EPPO. Therefore, it is crucial to establish a promotion career system (accompanied with other checks and control mechanisms, if necessary), which does not encourage the prosecutors to take on only cases, which are highly likely to be won (end up with the accused being guilty). Furthermore, the compliance with the fundamental human rights concerning rights of the accused (and rights regarding due process in general) is of utmost importance for the new EU prosecution body.

Inspiration shall be drawn from the Japanese approach towards victim assistance and protection. Even though the victim in case of PIF offences will be mostly the EU itself, other victims may emerge as well (such as in case of the "accompanying" offences).

The Japanese LRTI is another argument for establishment of a central education and training agency for the EPPO prosecutors (as well as in case of France and Germany).

As regards relations with state powers, the prosecution once again maintains a strong bond with the Ministry of Justice as the prosecutors' superior. However, the EPPO is, on the contrary, completely independent from other EU institutions, which is definitely to be considered an advantage. The rotation of judges, which (maybe unintentionally) prevents friendships and close

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[264] SAEKI, Hitoshi; JIN, Hiroaki; YOKOTA, Yozo. Pr*osecution Reform Initiatives in the Past Three Years, The Principles of Prosecution and Practice.* [online]. 2014. [cit. 30/12/2020]. Available at: http://www.kensatsu.go.jp/content/001142803.pdf

[265] Act No. 45 of April 24, 1907, Penal Code. Japan. Art. 197 and 198

[266] HERNÁNDEZ-GARCÍA, R. *Anticorruption Laws and Regulations, A Global Guide*, Globe Law and Business. 2018. ISBN: 9781787421172. p. 261

bonds of the prosecutors and the judiciary is, from my perspective, nothing to be adopted in case of the EPPO, since the idea of an EU prosecution body is on itself based on breaking those relationships on the national level.

The Muraki case, concerning serious misuse of powers by the Osaka prosecutors, is something to evade at all costs in case of the EU prosecution office. However, due to the strong supervision mechanisms of the Permanent Chambers over the Delegated Prosecutors working on the cases in every Member State, as well as rotation of the Permanent Chambers and accountability of the Chief European Prosecutor, I am of the opinion, that the measures are sufficient in ensuring proper control and lawfulness of the investigation and prosecution. Moreover, the existence of separate body to prosecute financial crime and corruption suggests considering the same regarding the EPPO.

4. Conclusion

I will attempt to summarize the interim conclusions reached while comparing every jurisdiction with the EPPO, and to achieve comprehend results and recommendations for the new EU prosecution office.

Since the EPPO is only now being established, it is of utmost importance to ensure a balanced approach of the new European Chief Prosecutor towards protection of financial interests of the EU. The pace, style and measures chosen at this very beginning may easily become a deep-rooted precedent for next Chief Prosecutors to come. Therefore, inspiration shall be drawn from Germany on one hand, and the US and Japan on the other, so that the new office is neither inefficient and too soft on the perpetrators, nor does the prosecution turn into an uncontrollable witch hunt.

Every EU institution is only as efficient as its human resources, therefore, the selection process of EPPO prosecutors is in my opinion a crucial step. All of the assessed countries have over the years established a unified, highly developed system of choosing its future prosecutors. In case of the new EU office, even though the process is stipulated in the EPPO Regulation, the criteria to fulfil by the nominees are only vague and unclear, and the same applies for the nomination process on the level of every Member State. I would advise to introduce either a unified exam, or strictly defined criteria (or both) for the European Prosecutors as well as for the Delegated ones in order to ensure high level of expertise for all of them. For the same reasons is in my opinion essential to establish a central separate body aimed at providing expert education and training for the prosecutors. French Judicial School, American EOUSA as well as Japanese LRTI all play a crucial role in the remarkable performance of the respective countries' prosecutors and the EU prosecutors shall receive the same. It would be, however, important to determine, if the education shall be received on the central level only, due to the costs, or if to include even the Delegated European Prosecutors. In my opinion would it depend mostly on the education and training, which they receive in the framework of their national prosecution offices. Lastly, as for the prosecutor's selection, I would highly recommend to consider the direct election of the European Chief Prosecutor by the citizens, which should, however, come together in a series of bills aimed at overall promotion of legitimacy and lowering of the democratic deficit (e.g. the *Spitzenkandidaten* or similar system).

An essential positive feature is the independence of the EPPO from all other EU or national institutions. Unlike Germany, France or mostly the US, in which are the prosecution offices either subordinate to the Ministry of Justice, or even directly part of it, the EU prosecution body is strictly independent. Therefore, measures focused on independence promotion like lifetime tenure of office in Germany or extensive discretion of the French prosecutors are unnecessary. Nevertheless, it is of utmost importance to preserve this state, since there may be pressure on breaching this independence, either because of particular cases, or just due to the fact that the Member States representatives are used to some level of prosecution subordination. The Chief European Prosecutor is, nonetheless, accountable for his actions and shall regularly report to the European Parliament and the Council.

Moreover, the US Justice Manual is worth mentioning, since it provides a useful source of various information for prosecutors country-wide in diverse situations. Such document shall be issued by the EPPO as well, or be included in the soon-to-be-adopted Rules of Procedure (mostly to instruct and guide the Delegated Prosecutors).

With regard to the relations of judicial branch and prosecution, currently, the EPPO and CJEU are clearly separated one from another and I am of the opinion, that it is essential to keep it that way even in case of possible future extension of competences (or e.g. if some or all of the crimes were to be heard in front of the CJEU instead of national courts). The French system, in which the line drawn between judgeship and prosecution is rather blur, shall provide a negative example of what should be evaded in case of EPPO. On the other hand, a strict separation of powers in the US represents a great inspiration.

The EPPO is a rare project in many ways, but one of the key features of its uniqueness is, that only the matters of protection of financial interests of the EU fall under its competence. Financial crime as well as corruption represent one of the most complex types of crime there is, and therefore are often fought by a special authority established only for this purpose, such as the French PNF or Japanese *Tokusobu*. However, even in countries, which decided not to create any such financial prosecutor, the complexity of economic crime is acknowledged, which is why there are at least special divisions assigned to tackle financial crime in major prosecution offices in Germany. I am of the opinion, that current state regarding this matter is sufficient when it comes to the EPPO, however, in case of possible future extension of competences, I would suggest to

create at least a special economic crime division in the office, or in extreme cases (e.g. major powers extension) even to establish a separate institution. Concerning the extension of powers, German Federal Prosecutor provides a great example of which types of crimes shall be included in a central body, such as the EPPO is – the most serious ones, meaning crimes against state (federation) and humanity. I would, however, recommend to extend the crimes worthy of inclusion also to all other forms of financial crime, so that such complex matters are being solved efficiently and on central level. Furthermore, the omnipresent threat of terrorism is another grave danger exceeding all borders, and shall therefore fall under the competence of the EPPO too (a draft proposal thereof is, however, already in the middle of the EU legislation process). Last but not least, the EU should be aware of its goals and adopt compliant foreign policies, which goes hand in hand with the issue of jurisdiction of its laws. I would personally recommend to draw inspiration from the US FCPA and to implement the extraterritorial jurisdiction for EU anti-corruption laws as well, even at the cost of lower competitiveness of EU-based companies due to extra budget requirements for compliance, so that moral values are put in front of money.

Since the job of European Prosecutors and their Delegated colleagues is going to be rather demanding and will require significant experience and excellent education, I would advise to provide them with as much support as possible in order for them to focus on the core tasks only. This may be achieved by assignment of assistants, as AUSAs or District (State) Attorney's Assistants work in the US. Or the central office aimed primarily at training and education (suggested above and inspired by Judicial School, EOUSA and LRTI) may be given other competences as well, such as IT and administrative support of the prosecutors. Furthermore, an interesting approach chosen among others in Germany may be considered: hiring experts from private sector, such as banks, consulting companies, agriculture enterprises (in case of agriculture subsidies) in order to support the prosecution with their unique expertise and experience.

Lastly, a separate institution, or preferably a department in the structure of the EPPO should be created in order to perform control and supervision over the compliance, AML (Anti-Money Laundering) and CFT (Counter-Financing Terrorism) measures adopted and maintained by particular companies (multinational corporations). The French AFA, but also HATVP could provide inspiration in this regard, helping with prevention of the criminal misconduct from happening in the first place.

To conclude, I am of the opinion, that assessed national prosecution systems provide reasonable amount of both positive and negative inspiration for the EPPO. Taking into consideration, that the EPPO itself is a unique and unprecedented project, this particular analysis could help significantly to make the new institution evade the national prosecution's mistakes as well as to be inspired from their achievements.

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Úřad Evropského veřejného žalobce: Komparativní analýza s vybranými národními systémy prokuratury

Abstrakt:

Úřad Evropského veřejného žalobce představuje nejen zásadní průlom v oblasti europeizace trestního práva, ale jako vůbec první prokuratura na světě s působností ve více státech též revoluční pohled na veřejnou žalobu v ostatních, nejen evropských, jurisdikcích. Vzhledem k tomu, jak citlivé téma je konvergence trestního práva na úrovni jednotlivých států EU, a jak moc si členské státy v této oblasti chrání svou suverenitu, není překvapivé, že na podobě, či dokonce na samotné existenci evropského prokurátora neexistovala (a stále neexistuje) shoda. Právě současná podoba úřadu, jeho strukturální dualita, kompetence, orgány, výběr žalobců, vztah a kompatibilita s národními systémy veřejné žaloby jsou předmětem této práce.

Pro účely zkoumání efektivity evropského žalobce a případných alternativ jeho jednotlivých aspektů je pak z mého pohledu nejvhodnější novou instituci porovnat s jinými, již existujícími systémy prokuratury v několika vybraných vyspělých státech. Konkrétně byly zvoleny Německo, Francie, USA a Japonsko, a to s ohledem na reprezentaci anglo-amerického i kontinentálního právního systému, velikost HDP, geopolitický význam, historický vývoj právního systému a druh státního zřízení.

V první části mé práce především analyzuji jednotlivé aspekty nového úřadu, jeho historické souvislosti a pozici v institucionální struktuře EU. Po objasnění skutečností vedoucích k založení této instituce je podrobněji rozebrána centrální a decentralizovaná struktura úřadu, stejně jako jeho jednotlivé orgány na centrální úrovni. Značná pozornost je též věnována pravomoci evropského žalobce a tudíž evropské směrnici PIF. V závěru této části je analyzován vztah nového úřadu s již existujícími evropskými institucemi a potenciální výzvy, kterým může v průběhu začleňování do struktur EU čelit.

Navazuje komparace se systémy veřejných žalob jednotlivých vybraných států, ve které je pro každou zemi zvolen stejný analytický postup. Po úvodu do organizace prokuratury je detailněji rozebrán postup výběru žalobců, po němž následuje zamyšlení nad pozicí veřejné žaloby ve vztahu k moci soudní a moci výkonné (legislativa zkoumána není, neboť v žádné z jurisdikcí jejich vztah nenasvědčuje ohrožení nezávislosti žalobců, především proto, že vzájemné pouto mezi nimi je slabé či vůbec neexistuje – s výjimkou přijímání zákonů v oblasti veřejné žaloby; legislativa má

však pravomoc přijímat zákony ve všech oblastech). Vzhledem k současné kompetenci evropského žalobce je pak též věnována pozornost otázkám vyšetřování a obžaloby některých forem zločinu, zejména organizovaného, finanční kriminality a korupce, speciálním elitním útvarem.

Závěrem jsou u každé země shrnuty nejdůležitější aspekty a doporučeny návrhy de lege ferenda ve vztahu k úřadu evropského žalobce. Tyto dílčí závěry jsou poté sumarizovány jako celek a je vytvořeno komplexní doporučení.

Klíčová slova: Úřad evropského veřejného žalobce, PIF Směrnice, národní žalobce, ochrana finančních zájmů Evropské Unie

The European Public Prosecutor's Office: Comparative Analysis with particular National Prosecution Systems

Abstract:

The European Public Prosecutor's Office provides not only a major breakthrough in the framework of European Criminal Law, but a revolutionary concept as a first cross-national prosecution system as well, including the non-European jurisdictions. Taking into account how sensitive is the matter of convergence of European Criminal Law for the Member States, as well as their endeavour to preserve sovereignty with regard to criminal policies, it is obvious, that there was not (and still is not) any agreement regarding the form, or even mere existence, of the EPPO.

In my opinion, for the purposes of the EPPO's efficiency assessment, as well as alternatives of its particular aspects, it is most suitable to compare it with other existing prosecutions systems in chosen developed countries. Germany, France, USA and Japan were chosen as those countries, pursuant to the criteria of both Anglo-American and continental legal systems representation, the countries' GDP, geopolitical significance, the development of their legal systems in history, and the type of political establishment.

In the first part of my thesis, I focus on analysing the aspects of the new office, its historical background and position in the overall EU institutional structure. After clarifying the circumstances, which led to the EPPO's foundation, the decentralised and centralised structure – including organisation – is subject to assessment. The competences of the EU prosecutor and therefore also the PIF Directive are also given significant space. In the end of this part an assessment of the relations between the EPPO and already existing European institutions is being performed, as well as possible challenges, which the body may face while finding its place among the EU structures.

Furthermore, the comparison of the EPPO with national prosecution systems of chosen countries is provided, using an identical analytical approach for all of them. After introduction into the prosecution offices organisation, the selection process of prosecutors is being subject to consideration, followed by description of the relationship of public prosecution towards the judiciary and executive branch (legislation is not analysed, since their relations do not pose a threat for the prosecutors' independence in neither of the jurisdictions, mostly because the relationship is in general weak or non-existent – with the exception of passing laws related to prosecution,

however, legislation is authorised to pass laws in all matters). With respect to the current competences and powers of the EPPO, a grave concern is also given to the issues related to investigation and prosecution of particular forms of crime by a special elite authority - namely organised and financial crime, as well as corruption.

The most essential aspects are summarized as well as recommendations de lege ferenda related to the EPPO are provided in the conclusion of every assessed country. Those interim conclusions are then assembled and a comprehend recommendation is prepared thereof.

Key words: European Public Prosecutor's Office, PIF Directive, National Prosecutor, protection of financial interests of the European Union