

THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE BETWEEN COUNTER-TERRORISM AND STRENGTHENING OF THE EUROPEAN CITIZENS' SAFETY

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The European Public Prosecutor's Office between counter-terrorism and strengthening of the European citizens' safety

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I. The need for a *European Public Prosecutor's Office* (EPPO) for the counter-terrorism

The debate on safety within the European Union has been dramatically re-opened by the terrorist attacks in Paris (January and November 2015) and in Brussels (March 2016). The Union does not currently have appropriate instruments to prevent possible terrorist attacks. Moreover, the Member States cannot prevent and counteract such crimes by adopting measures taken individually.

In addition to facilitating the free movement of the European citizens¹, the progressive elimination of checks at the borders within the EU² has made it easier to achieve criminal and terrorist activities on a transnational basis. Indeed, even if they were carried out in the territory of a single Member State, such serious wrongdoings develop through a preparation phase based in several Member States and non-EU countries. The executing authors are not only citizens of third countries, but they are increasingly EU citizens. Terrorist networks have no borders and they often exploit the differences among the ways of acting of the police and justice systems of the Member States of the Union.

As they develop on a transnational dimension, these new forms of terrorism can only be hit with instruments which cannot be owned by single Member States.

1 The right to move freely is one of the fundamental freedoms granted by the Union to its citizens. See Art. 20, § 2 TFEU, which expressly refers to the connection between freedom and citizenship, Art. 21 TFEU and art. 45, § 1 of the Charter of Fundamental Rights of the European Union.

2 See Schengen Agreement: The Schengen area and cooperation of 14 June 1985, in *Official Journal of the European* (OJEU 22/9/2000).

The need is to go beyond the simple emergency measures, unlike in the aftermath of the terrorist attacks of 11 September 2001. On that occasion the Member States of the Union did not go beyond the institution of the European Arrest Warrant³ and the adoption of the Framework Decision 2002/475/JHA⁴. This last one required the Member States of the EU to align their legislations and to introduce minimum penalties for terrorist offences. However, it was not effective in preventing what happened in Europe in 2015.

In spite of this, the Member States of the EU seem not willing to learn from history. In fact, after the attacks in Paris, they did not go beyond the creation of the *European Counter Terrorism Center* (ECTC)⁵; the adoption of the directive on the use of Passenger Name Record data for the detection, investigation and prosecution of terrorist offences⁶; and the adoption of the legal framework on the fight against terrorism⁷.

3 See 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision *Official Journal* L 190, 18/07/2002.

4 See 2002/475/JHA Council Framework Decision of 13 June 2002, on combating terrorism, in *Official Journal of the European Communities (OJEC)*, L 164, 22/06/2002.

5 Cf. JHA Council Conclusions 848/15 of 20th November 2015. The European Counter Terrorism Center has been founded in haste after the attacks in Paris in November 2015 and became operational in January 2016. In the intentions of the Member States and of the Union, this institute will be a platform aimed at enabling competent authorities responsible for counter-terrorism to strengthen sharing of information and operational cooperation on monitoring and investigation activities regarding foreign terrorist fighters, illegal firearms trade and the financing of terrorist organisations. The Member States will be posting counter-terrorism experts to the ECTC in order to create a strengthened unit of support to the cross-border inspections, able to supply a quick and global support to the investigations on serious terrorist attacks in the EU. Eurojust is also taking part in the activities of the ECTC.

6 See Directive 2016/681/EU, published in the *Official Journal* of 4 May 2016 L 119. The Member States must transpose this act by 25 May 2018. This directive foresees the creation of a register containing international flights passenger data. Precisely, air carriers will be obliged to provide the authorities of the Member States with PNR data for the arriving or departing flights from the EU, whereas the Member States will be collecting the PNR data concerning selected intra-EU flights. Collected data will be kept in the archive for 5 years. By means of this register it will be easier to identify potential suspects.

7 On 20 September 2016, the Council adopted a legal framework (Council Regulation (EU) 2016/1686 of 20 September 2016 imposing additional restrictive measures directed against ISIL (Da'esh) and Al-Qaeda and natural and legal persons, entities or bodies associated with them; Council Decision (CFSP) 2016/1693 of 20 September 2016 concerning restrictive measures against ISIL (Da'esh) and Al-Qaeda and persons, groups, undertakings and entities associated with them and repealing Common Position 2002/402/CFSP) which, for the first time, will allow the EU to apply sanctions autonomously to ISIL/Da'esh and Al-Qaida and persons and entities associated or supporting them. Until now sanctions could only be applied to persons and entities listed by the United Nations or by EU member states acting individually. The EU will be able to impose a travel ban on individuals and an asset freeze on individuals and entities that are identified as being associated with ISIL (Da'esh)/Al-Qaida. This means that all their assets in the EU will be frozen and that EU persons and entities will also be prohibited from making any funds available to listed persons or entities. The individuals and entities targeted include those who have participated in the planning or perpetrating of terrorist attacks or have provided ISIL (Da'esh)/Al-Qaida with financing, oil or arms, or have received terrorist training from them. Persons or entities could also be listed for activities such as recruiting; inciting or publicly provoking acts and activities in support of these organisations, or being involved in serious abuses of human rights outside the EU, including abduction, rape, sexual violence, forced

The first two actions are aimed at the collection of information and at cooperation between police and intelligence forces. The Regulation 2016/1686/EU⁸ and the Decision 2016/1683/CFSP⁹ have the aim of strengthening the legal framework against terrorist offences. They define preparatory actions such as training and trips abroad for terrorist purposes as offences, thus dealing with the issue of foreign fighters, as well as aiding, inciting and attempting these actions.

The feeling is that without a European institution able to investigate and prosecute such offences, the measures contained in it will not be able to achieve successful results. Likewise, few results will be achieved only with the projects aimed at increasing information exchange and cooperation between European police and intelligence forces without the rationalisation of agencies with police powers¹⁰.

For these reasons, there is urgent need not only to refine the legal framework, but also to establish a European Public Prosecutor's Office which can start investigations at a European level, facilitate the sharing of information among investigating authorities for the purposes of proof in criminal proceedings, prevent and counteract terrorist offences with effective actions.

The Treaty of Lisbon¹¹ contains two promising responses to these problems. The former is the abolishment of the Union's pillar structure, resulting in an extension of the Community method to the police and judicial cooperation in criminal matters¹². In such a renewed legal framework, in the context of substantive

marriage and enslavement of persons. The EU will also be able to impose restrictive measures on individuals travelling or seeking to travel both outside the EU, and into the EU, with the aim of supporting, ISIL (Da'esh)/Al-Qaida or receiving training from them. Such measures will target particularly the so-called "foreign fighters". As a result the EU will be able to list any person who meets the criteria - including EU nationals who have supported these organisations outside the EU and who then return. The travel ban will prevent listed persons from entering any EU member state. In the case of a listed EU national, the travel ban will prevent the listed person from travelling to any EU member state other than the member state of which that person is a national.

8 Council Regulation (EU) 2016/1686 of 20 September 2016 imposing additional restrictive measures directed against ISIL (Da'esh) and Al-Qaeda and natural and legal persons, entities or bodies associated with them, published in the *Official Journal* of 21 September 2016, L. 255.

9 Council Decision (CFSP) 2016/1693 of 20 September 2016 concerning restrictive measures against ISIL (Da'esh) and Al-Qaeda and persons, groups, undertakings and entities associated with them and repealing Common Position 2002/402/CFSP, published in the *Official Journal* of 21 September 2016, L. 255.

10 The European Union has six agencies with police, investigation and intelligence powers: European Police Office (EUROPOL); European Intelligence Centre (EU INTCEN); European Military Staff (EUMS); European Counter Terrorism Centre (ECTC), Eurojust and European Anti-Fraud Office (OLAF). Europol and OLAF are the oldest institutes, founded in 1999. The former should have characterised itself as a first embryo of a sort of European FBI, whereas the latter investigates fraud against the EU budget, such as fraud on structural funds and embezzlement. INTCEN, subordinated to the European External Action Service since 2012, serves as a centre for the collection and analysis of data. It should be stressed that only one of the six institutes here mentioned, that is OLAF, has the power to start investigations independently.

11 See Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, in OJEU, 2007/C 306/01 of the 7 december 2007. See M. FRAGOLA, *Il Trattato di Lisbona*, Milano, 2010, p. 214.

12 See C. AMALFITANO, « La competenza penale dell'Unione Europea dopo il Trattato di Lisbona », in L. CAMALDO (eds.), *L'istituzione del Procuratore europeo e la tutela penale degli*

criminal law, Article 83 TFEU allows the Parliament and the Council to establish minimum rules regarding the definition of offences and penalties in the areas of particularly serious crime with a transnational dimension, such as terrorism¹³.

The latter is contained in Article 86 TFEU, which represents the appropriate legal basis for the creation of the *European Public Prosecutor's Office* (EPPO), whose project had started several years ago¹⁴.

The establishment of such a European organisation is part of the development and strengthening of the field of judicial cooperation in criminal matters, deeply innovated by the Lisbon Treaty¹⁵. This cooperation is based on the mutual

interessi finanziari dell'Unione europea, Torino, 2014, p. 19 ; C.-E. PALIERO, F. VIGANÒ, (eds.) *Europa e diritto penale*, Milano, 2013 ; R. KOSTORIS, (eds.) *Manuale di procedura penale europea*, Milano, 2014 ; C. SOTIS, *Il Trattato di Lisbona e le competenze penali dell'Unione europea*, Cassazione penale, 2010, n° 3, p. 1146.

- 13 The European institutions can intervene with minimum rules in other areas of particularly serious crime with a transnational dimension, such as : trafficking in human beings and sexual exploitation of women and children ; illicit drug or arms trafficking ; money laundering ; corruption ; counterfeiting of means of payment ; computer crime and organised crime.
- 14 The creation of the new figure of the European Prosecutor starts with the *Corpus juris* drafted in 1997 by a group of researchers and scholars from different Member States on behalf of the European Commission. In 2000 a modified version of the project was presented. These documents were followed by the *Green Paper on criminal law protection of the financial interests of the Community and the establishment of a European Prosecutor*, presented by the European Commission in 2001. The purpose of the Green Paper was to encourage a reflection upon the harmonisation of criminal legislation in relation to the protection of the EU's financial interests and upon the creation of an investigative body able to conduct investigations in the common area of freedom, security and justice. The establishment of *Eurojust*, with the Framework Decision of 28 February 2002, as a unit for judicial cooperation to strengthen the fight against organised crime and the failure of the *Constitutional Treaty* of 2004, which contained a specific provision on the establishment of the European Public Prosecutor's Office, have pushed further the creation of EPPO. The Lisbon Treaty has revived the debate on the creation of the European Public Prosecutor's Office through article 86 TFEU. See M. DELMAS-MARTY (eds.) *Corpus juris portant dispositions pénales pour la protection des intérêts financiers de l'Union européenne*, Paris, 1997 ; G. GRASSO, R. SUCURELLA (eds.) *Il Corpus Juris 2000. Un modello di tutela penale dei beni giuridici comunitari*, Milano, 2003 ; M. PANZAVOLTA, *Lo statuto del pubblico ministero (ovvero ologramma di un accusatore continentale)*, in M.-G. COPPETTA, (eds.) *Profili del processo penale nella Costituzione europea*, Torino, 2005 ; L. CAMALDO, *Il pubblico ministero europeo dal Corpus juris al Trattato di Lisbona : un fantasma si aggira nell'Unione europea*, in C. ZANETTI, M. CORSO (eds.), *Studi in onore di Mario Pisani*, Piacenza, 2010, pp. 69-94 ; K. LIGETI, M. SIMONATO, *The European Public Prosecutor's Office : Towards a Truly European Prosecution Service?*, *New Journal of European Criminal Law*, 2013, vol. 4, Issue 1-2, p. 7 ; M. CAINELLO, *The Proposal for a Regulation on the Establishment of an European Public Prosecutor's Office : Everything Changes, or Nothing Changes?*, *European Journal of Crime*, 2013, pp. 115-725 ; L.-H. ERKELENS, A.-W.-H. MEIJ, M. PAWLIK (eds.), *The European Public Prosecutor's Office : An extended arm or a Two-Headed dragon?*, London, 2015 ; K. LIGETI (eds.), *Toward a Prosecutor for the European Union : A Comparative Analysis*, Oxford, 2014 ; K. LIGETI (eds.), *Toward a Prosecutor for the European Union: Draft Rules of Procedure*, Oxford, 2016 ; K. LIGETI, M. SIMONATO, *The European Public Prosecutor's Office: Towards a Truly European Prosecution Service?*, *New Journal of European Criminal Law*, 2013, vol. 4, Issue 1-2, p. 7.
- 15 V., R. ADAM, A. TIZZANO, *Manuale di diritto dell'Unione europea*, Torino, 2014, p. 558 ; E. APRILE, F. SPIEZIA (eds.), *Cooperazione giudiziaria nell'Unione europea prima e dopo Lisbona*, Torino, 2009.

recognition of judgments and judicial decisions (Art. 82 TFEU)¹⁶ and includes both the approximation of the laws and regulations of the Member States, in the fields indicated in the second paragraph of Article 82 TFEU and in Article 83 TFEU¹⁷, and the measures aimed at encouraging and supporting the work of the Member States in the field of crime prevention (Article 84 TFEU). The Union has adopted several legislative instruments in accordance with the principle of mutual recognition. Among the several instruments adopted in this field¹⁸, the most relevant are the European Arrest Warrant, the European Evidence Warrant¹⁹ and the European Investigation Order in criminal matters²⁰. The European Prosecutor will permit, on one side, to go beyond these instruments and achieve more effective results; on the other side, he will permit to complete and strengthen operational judicial cooperation in criminal matters²¹, providing a greater contribution than that provided by Eurojust so far²². Furthermore, this would represent a considerable step forwards towards the creation of a real area of freedom, security and justice and a greater security of European citizens.

16 This recognition makes it possible that the decision produces, outside the State where it has been adopted, the legal effects foreseen by the criminal law of that State, and also those foreseen by the criminal law of the State which acknowledges the decision. These effects will be produced even if there is not a perfect match on the level of substantive and procedural provisions of the two States, as it is decisive in this respect the mutual trust between Member States and the commonality of the fundamental principles of the two legal orders on the ground of appropriate guarantees of the rights and of the procedures.

17 The fields in question are: mutual admissibility of evidence between Member States; the rights of individuals in criminal procedure; the rights of victims of crime; any other specific aspects of criminal procedure, which the Council has identified in advance by a decision.

18 This area includes 2003/577/JHA Council Framework Decision – Court orders freezing criminal assets or evidence – recognition abroad (OJEC 20/06/2003); 2005/214/JHA Council Framework Decision on the application of the principle of mutual recognition to financial penalties (OJEC 22/3/2005); Council Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders (OJEC 24/11/2006); 2008/909/JHA Council Decision Framework – application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (OJEC 5/12/2008).

19 See 2008/978/JHA Council Framework Decision on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters (OJEC 30/12/2008).

20 Directive 2014/41/EU of the European Parliament and of the Council, of 3 April 2014, *in OJEU*, L. 130 1. This investigation order can be issued by a Member State and requires that all the others to carry out all the investigations for the acquisition or, if it is the case, the transmission of evidence in their possession.

21 See F. DE ANGELIS, « L'espace judiciaire pénal européen : une vision se concrétise », *Revue du droit de l'Union européenne*, 2011, n° 2, p. 191.

22 See 2002/584/JHA Council Framework Decision on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision (OJEC 18/07/2002). See J. VERVAELE, *The Shaping and Reshaping of Eurojust and OLAF Investigative Judicial Powers in the European Judicial Area*, *Eurocrim*, 2008, p. 180 ; S. PEERS, *EU Justice and Home Affairs Law*, Oxford, 2011.

II. The advantages of a European Public Prosecutor's Office with counter-terrorism competence

The legal basis for the future European Public Prosecutor's Office, Article 86 TFEU, provides that it will be mainly empowered to investigate, prosecute and bring to judgment the authors of offences against the financial interests²³ of the Union²⁴. The possibility to extend the competence of the Office is contained in paragraph 4 of Article 86 TFEU. This rule allows the Council, on the basis of a unanimous decision, after the approval of the EP and after consulting the Commission, to enlarge the competence of the European Public Prosecutor's Office to include other serious transnational offences, among which can be certainly included acts of terrorism²⁵.

Hastened by these dispositions and by the recent terrorist attacks, the European institutions have to work in order to include among the competences of the EPPO the fight against terrorism, too. The way to proceed is an uphill path, because the Member States impede the creation of the EPPO²⁶ and are unwilling to grant to the office-to-be additional competences to those concerning financial offences. In particular, the Member States are against giving anti-terrorism tasks

23 According to the Report from the Commission COM (2012) 363, of 11 July 2012, we can include within the meaning of financial interests of the Union all funds managed directly by or on behalf of the Union. The case-law of the Court of Justice of the European Union agrees with this definition, as results from judgment C-539/09, of 15 November 2011.

24 The disposition in question raises substantial problems. It is necessary to identify the offences, which would fall within the competence of the EPPO. In order to further define the offences covered by the competence of the European Public Prosecutor Office, above all, it is necessary to identify the best legislative technique between the approximation of the legislations and their unification. It will be necessary to intervene on this point with a subsequent regulation, which will specify the different types of offences. The European Public Prosecutor Office should also be able to prosecute the offences against the financial interests of the Union resulting from the criminal activity carried out by an organisation.

25 See A. VENEGONI, *Procura europea e reati di terrorismo: un connubio impossibile?*, *Questione Giustizia*, del 12 febbraio 2015, p. 2; B. SMULDERS, *Is the Commission Proposal for a European Public Prosecutor's Office Based on a Harmonious Interpretation of Articles 85 and 86 TFEU?*, L.-H. ERKELENS, A.-W. MEIJ, M. PAWLIK (eds.), *The European Public Prosecutor's Office: An extended arm or a Two-Headed dragon?*, *op. cit.*, pp. 41-57.

26 Right from the start of the negotiations the Member States have impeded the creation of the EPPO. It should be pointed out that in Autumn 2013 the national Parliaments of Austria, Germany and Poland started the *Early Warning System*, established by Article 7 p. 2 of Protocol n° 2 to the Treaties. In this way, those Member States have expressed doubts about the Commission proposal, recognizing a breach of the subsidiarity principle. The response to these critics has excluded any change or withdrawal of the proposal for a regulation. This proposal has passed the pre-screening of the EP (Resolution of 12 March 2014), which has suggested some actions aimed at mending anomalies, which risked to undermine the structure and the activity of the new organisation. Much-publicised as a priority during the disappointing Italian Presidency semester, the organisation is still far from its establishment, so much so that Italy has vetoed the Council meeting of December, stating that the result of one year of negotiations was so disappointing that it did not even deserve a legal act. See L. CAMALDO, « Work in progress sulla Procura europea: alcuni emendamenti proposti nella recente Risoluzione del Parlamento europeo », in *Criminal Court of Cassation*, n° 7, 2014, pp. 2696-s.

to the EPPO²⁷, as this competence is part of a strictly national matter, that is internal security.

The Member States and a part of the European doctrine²⁸ assert that the European Public Prosecutor's Office would make the complexity of the supranational system of fight against terrorism increase, slowing it down and making it less effective. Hence, the safest path to combat this crime phenomenon would be the strengthening of the already existing agencies: Europol and Eurojust. The recent approval of the Regulation EU 2016/794²⁹ concerning Europol demonstrates that the will of the Member States is to continue on this path and not to move towards a greater integration in this field.

The Regulation EU 2016/794 strengthens the Europol's mandate. In particular, it will be easier for this agency to quickly create specialised units, manage the data of the identification number of passengers flying in Europe and exchange information directly with private individuals and NGOs. The projects for the strengthening of Eurojust, instead, proceed slowly. Even though this organisation has been given competences in the coordination of transnational investigations in the field of terrorism, the European institutions and the Member States do not seem in agreement in finding solutions to improve it. It can be asserted that both the organisations have an ancillary role to the national authorities in the prevention of terrorist crimes and show significant weaknesses. For instance, Article 88 TFEU entrusts Europol with tasks of mere coordination, which can be requested on a voluntary basis by the police authorities of the Member States, while Article 85 TFEU does not permit that Eurojust conducts investigations on its own initiative.

Because of the dangers they run, the EU and the Member States should create an institution with a proactive role in the fight against terrorism and which can start investigations on its own all over the EU territory. This need can be fulfilled by a European Public Prosecutor's Office provided with the means, the powers and the actual competence to combat international terrorism.

27 The Italian State has expressed several doubts and has stood up again for the needs of a European Public Prosecutor Office fighting terrorism immediately after the attacks in Brussels. With the support of France, of Belgium and of Spain, Italy has proposed to strengthen the European legislation fighting the trafficking in cultural goods, suspected of being a primary source of funds for terrorism, and to punish trips abroad for terrorist purposes within the European Union. But both Italy and other Member States are against an organisation composed of the antiterrorism public prosecutors of the Member States coordinated by a European Public Prosecutor.

28 See C. DI STASIO, *La lotta multilivello al terrorismo al terrorismo internazionale. Garanzia di sicurezza versus tutela dei diritti fondamentali*, Torino, 2010, p. 189 ; J.-G. DE VRIES, *The European Union's role in the fight against terrorism*, *Irish Studies in International Affairs*, 2015, pp. 3-9 ; J.-C. MARTIN, « L'Union européenne et la lutte contre le terrorisme », *Revue du droit public et de la science politique en France et à l'Étranger*, 2015, n° 2, p. 342.

29 See Regulation 2016/ 794/UE 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 (OJEC 25/05/16).

The other part of the European doctrine³⁰ has expressed itself in favour of this thesis, acknowledging that there would be several advantages deriving from the establishment of the EPPO with these tasks and these powers. In addition, it has emphasized that this would be the natural step forward to improve the fragile Union system for the fight against the terrorist phenomenon³¹.

The establishment of the European Public Prosecutor's Office would reduce the difficulties in carrying out criminal investigations involving different Member States, due to the long times and to the different evidentiary rules. Moreover, it would put an end to the situation in which the judicial authorities of a Member State do not open criminal investigations, following the indications of equivalent authorities of another Member State, a fact that reduces the probabilities to prevent such crimes significantly. The agencies of the Union have failed above all in this type of cooperation so far. It is established that difficulties have arisen in the real, loyal and complete exchange of information, crime reports and measures of investigation among authorities of different States. National authorities do not actually collaborate with each other, as provided for by the principle of mutual confidence. The news flows to Eurojust seem, according to many national organisations, insufficient and sometimes reticent. Considering that the European Public Prosecutor's Office should act as a single office throughout the EU – far beyond the territory of a single Member State – the EU would be for the

30 It should be pointed out that the debate on the creation of a European Public Prosecutor Office with anti-terrorism powers started in 2008 with J.-A.-E. VERVAELE, who expressed the expectation that it was necessary to start working as soon as possible for the establishment of a European Public Prosecutor Office with this competence (see J.-A.-E. VERVAELE, *Future of European Criminal Law and Harmonization of Criminal Law Enforcement*, lecture at the Max Planck Institute for Foreign and International Criminal Law, 8th March 2008). In addition, the Italian and French European Federalist Movement after the attacks in Paris in January 2015 issued a joint appeal to assert the necessity to create a European Public Prosecutor's Office with the tasks of combating transnational terrorism (see <http://www.taurillon.org/une-reponse-europeenne-a-la-menace-terroriste-un-parquet-europeen> of 26 February 2015). The European doctrine supporting the thesis is varied, see above all A. VANEGONI, *Procura europea e reati di terrorismo: un connubio impossibile?*, *op. cit.*; M.-L. WADE, *The European Unione as a counter-terrorism actor: right path, wrong direction?*, *Crime Law and Social Change*, 2014, vol. 62, p. 369; M.-L. WADE, *A European public prosecutor: potential and pitfalls*, *Crime Law and Social Change*, 2013, vol. 59, p. 441; F. DE LONDRAS, *Governance Gaps in EU counter terrorism: implications for democracy and constitutionalism*, in F. DE LONDRAS, J. DOODY (eds.), *The Impact, Legitimacy and Effectiveness of EU Counter-Terrorism*, London, 2015, p. 204; MURPHY, A. BORDA, L. ZAMMIT HOYTE, *The perspectives of counter-terrorism operatives on EU counter-terrorism law and policy*, in F. DE LONDRAS, J. DOODY (eds.), *The Impact, Legitimacy and Effectiveness of EU Counter-Terrorism*, 2015, p. 157; J. DOODY, *The institutional framework of EU counter-terrorism*, in F. DE LONDRAS, J. DOODY, (eds.), *The Impact, Legitimacy and Effectiveness of EU Counter-Terrorism*, *op. cit.*; J.-A.-E. VERVAELE, *European Criminal Justice in the Post-Lisbon Area of Freedom, Security and Justice*, Napoli, 2014, p. 259; J.-A.-E. VERVAELE, "The material scope of competence of the European Public Prosecutor's Office: Lex incerta and unpraevia?", in *ERA Forum*, 2015, vol. 15, n° 1, p. 89; R. ONUFREICIUC, L. MAFTEI, "Establishing the European Public Prosecutor's Office. A necessity in the regional context or a diminution of competences?", *EURINT*, 2015, vol. 2, n° 10, p. 281.

31 See M.-L. WADE, *The European Unione as a counter-terrorism actor: right path, wrong direction?*, *op. cit.*, p. 370.

European Public Prosecutor's Office a whole, indivisible territory, in which it could exercise its powers independently, intervene promptly and forward information needed for the investigations quickly.

In addition, the establishment of the EPPO would permit to definitively overcome both the problem of forwarding and obtaining evidence and that of conducting criminal prosecution in transnational cases. The European Public Prosecutor's Office could collect certain evidence elements without having territorial limits in its investigations. In the investigations with transnational relevance, the Public Prosecutors of the Member States can only start a collaboration and transmit evidence and previously obtained documents to each other³². This does not avoid the possibility that the two criminal investigations are two separated proceedings, conducted in accordance to different national criteria; so, it is not excluded that two different judicial conclusions are reached for a single crime in two Member States. The risk of divergent judgments will be eliminated when the investigation is conducted by a European Public Prosecutor³³, who has had the possibility to fully acknowledge the facts and to collect all the necessary evidence in all the involved Member States and who also has the power to conduct criminal prosecutions before a single national jurisdiction in respect of all defendants.

In comparison to the work of the single national Public Prosecutors, who only operate on a territorial basis, the added value of the EPPO is represented by the fact that the European Public Prosecutor can grasp all the complexity of the terrorist network. The European Public Prosecutor's Office would be able to reconstruct the invisible threads in the territorial basis, to trace the connections among terrorist networks, their financing channels, the recruitment models and the relations between the different national networks. This is possible also thank to the constant exchange of information and to the establishment of a common computerised database of the EPPO, directly accessible by all the European Public Prosecutors.

In brief, without a European Public Prosecutor's Office with competences in the fight against terrorism and operating throughout the territory of the Union, it will not be possible to ensure safety for the Union citizens. The current system

32 The system created by the recent Directive 2014/41/EU of 3 April 2014 (in *OJEU* 1 May 2014, L. 130/1) concerning the European Investigation Order (EIO) in criminal matters does not seem satisfactory. The European institutions have drawn up this instrument taking inspiration by the principle of mutual recognition. The EIO is the result of a new approach, which aims at creating a global system of evidence acquisition, especially with a cross-border dimension, that can replace all the existing instruments in the field and that can be used for all the kinds of evidence with precise and quick means of executions and with well-defined grounds for refusal. The Directive seems to neglect completely the implications connected to the differences among different national legal systems, with reference to the system of collected data usability, i.e. out of the trial where they will be assessed for the decision. The effectiveness of an inter-State collaboration for the movement of evidentiary material depends above all on transmitting material which could be used in the requesting Member State. Actually, it is pointless to ensure the transfer of the evidentiary data if this cannot be used in the destination trial.

33 See A. VANEGONI, *Alcune buone ragioni per l'istituzione di un Ufficio del Procuratore europeo*, in (www.penalecontemporaneo.it) of the 24 May 2012.

of fight and suppression independently carried out by each Member State allows terrorists to choose where to operate criminal activity or the Member State where to move after committing an offence. In this precise historical period, the EPPO seems more than ever necessary to protect the European citizens from the terrorist threat and, by means of the good results it will achieve, to improve their identity spirit for the Union. At the same time, the establishment of a European Public Prosecutor's Office with these characteristics seems a distant goal. The negotiations in the Council are blocked by the will of the Member States not to grant competence in anti-terrorism matters to the new European organisation and to limit its field of action.

III. The physiognomy of the European Public Prosecutor's Office emerging from current negotiations

The Commission Proposal for a regulation of 2013³⁴ was only the first step of a long legislative process. Subsequently, the resolution adopted by the European Parliament in March 2014 called for actions aimed at solving the anomalies, which were risking undermining the structure and the activity of the new organisation. The Draft Regulation is currently before the Council. This step is quite complicated and there have been several variations to the Commission proposal for a regulation. The following analysis takes into account the amendments made by the Council in recent negotiations.

Precisely, Article 86 TFEU provides a special legislative procedure (ex. Art. 289 TFEU, paragraph 2) for the adoption of the founding regulation, which requires the unanimity of the members of the Council, after the approval of the European Parliament. In case of lack of unanimity, an enhanced cooperation procedure³⁵ among at least nine Member States is provided. In order to ensure uniform application of the EU law, the dangers arising from the establishment of a European Public Prosecutor's Office only for a part of the Member States cannot be underestimated³⁶. The fragmentation of the European criminal law

34 See Opinion of the European Economic and Social Committee on the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office COM(2013) 534 final 2014/C 170/14. See F. SPIEZIA, *L'istituzione del Procuratore europeo nella proposta di regolamento della Commissione europea del 17 luglio 2013: quali nuovi assetti per lo spazio europeo di libertà, sicurezza e giustizia?*, *Cassazione Penale*, 2014, n° 6, p. 1828; G. DI PAOLO, S. MARCOLINI (eds.) *Verso l'istituzione di una Procura europea a protezione degli interessi finanziari dell'Unione: la proposta di regolamento COM (2013) 534*, *Cassazione Penale*, n° 3, 2014, p. 360.

35 Enhanced cooperation is a decision making procedure institutionalised with the Treaty of Amsterdam and later modified with the Treaty of Nice. It consists in creating a stronger cooperation among some Member States of the European Union in certain matters, such as justice.

36 See S. PAWLEC, *Implications of Enhanced Cooperation for the EPPO Model and Its*

area is already one of the contributory causes of the poor effectiveness of the European action against crime and, consequently, it is considered by someone as a determining reason to provide the Union with this organisation³⁷.

The rules of the Treaties do not lay down a precise structure for the European Public Prosecutor's Office, instead they recall the regulation for its definition. The modifications to the initial Proposal for a regulation have shaped an organisation, which is independent in the exercise of its functions³⁸, indivisible, with a legal personality, and operating as a single office with a decentralised structure³⁹.

It is organised with a central office formed by the College of Permanent Chambers, the European Chief Prosecutor, his substitutes and the European Prosecutors.

The European Chief Prosecutor⁴⁰ is at the top of the structure. He represents, organises the work and directs the activity of the EPPO. He is appointed by the Council, with the approval of the EP for a nonrenewable period of nine years and is assisted by two substitutes in the exercise of his functions. The European Prosecutors are selected by the Member States and represent both the link and the information channel between Permanent Chambers and the Delegated European Prosecutors. Officials have the task to supervise investigations and criminal proceedings to which they are assigned by the Permanent Chamber in charge for the case. The control consists in an activity of constant monitoring on the investigations and on the criminal proceedings and results in full powers of intervention, in addition to the possibility of formulating instructions directed to the Delegated Prosecutors⁴¹.

The Delegated European Public Prosecutors⁴², appointed by the European Public Prosecutor in agreement with the Member States, operate on a decentralised level. They practically carry out investigative action, as they are directly responsible for the investigations and for prosecutions and, in the performance of their functions,

Functioning, L.-H. ERKELENS, A.-W.-H. MEIJ, M. PAWLIK (eds.), *The European Public Prosecutor's Office: An extended arm or a Two-Headed dragon?*, op. cit., p. 209; R.-E. KOSTORIS, *A European Public Prosecutor Office against Euro-financial Crimes: Which Future?*, *Journal of eastern-european criminal Law*, 2015, n° 2, p. 31.

37 See N. PARISI, *La Procura europea: Un tassello per lo spazio europeo di giustizia penale*, op. cit., p. 3; E. PERILLO, « Le droit pénal substantiel et l'espace de liberté, sécurité et justice : deux ans après Lisbonne », *Diritto dell'Unione europea*, 2012, n° 3, p. 577.

38 See art. 6 Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, n° doc. 9372/1/15 REV 1, 22/12/2015. Si v. K. LIGETI, M. SIMONATO, *The European Public Prosecutor's Office: Towards a Truly European Prosecution Service*, op. cit., p. 14.

39 See art. 7 Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, cit. Si v. S. WHITE, N. DORN, *Towards a decentralised European Public Prosecutor's Office*, *Amicus Curiae*, Spring 2012, Issue 89, pp. 1-8.

40 See art. 10 Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, cit.

41 See L. CAMALDO, *La nuova fisionomia della Procura europea all'esito del semestre di presidenza italiana del Consiglio europeo*, *Cassazione penale*, 2015, n° 2, p. 810.

42 See art. 12 Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, cit.

act on behalf and following the instructions of the European Public Prosecutor's Office, in the person of the responsible European Prosecutors. It must be pointed out that the Delegated European Public Prosecutors are characterised by the so called "double hatting", because they act as Public Prosecutors under the exclusive authority of the European Public Prosecutor and comply with his instructions and guidelines, but at the same time they keep the functions of investigative bodies and those of prosecution inside their national law. Where there are conflictual assignments, the Delegated European Public Prosecutor informs the European Public Prosecutor's Office, which, after consulting the national one, can give instructions in order to make the functions deriving from belonging to the latter office prevail⁴³, in the interest of the investigations and of the prosecuting action of the EPPO. Among the open issues, there is still the determination of the number of the Delegated Public Prosecutors, as well as the possibility to establish an interface on a national basis for their need for coordination.

The above-described model for a European Public Prosecutor's Office has two advantages. Firstly, it allows to have a system which is immediately available and operating, from the point of view of resources and structures, being founded on the existing national offices and being limited to the establishment of the central Office only⁴⁴. Secondly, the solution of the integrated model will permit close operation and the development of synergies between the offices of the Public Prosecutor and the other authorities operating on a national basis: magistracy, police forces and administrative authorities, with particular reference to those responsible for obtaining crime reports, on the basis of which the office of the European Public Prosecutor will operate.

The functioning of the model will depend on the degree of integration that will be established on a national level, in order to avoid that the Delegated European Public Prosecutors are perceived as the expression of another office. This could favour closing attitudes and low cooperation to the European officials⁴⁵, especially in terms of quantity and quality of information to be shared, in the cases having a complex dimension and involving types referable to the two different competences.

43 See S. WHITE, Towards a decentralised European Public Prosecutor's Office?, in *European Journal of Crime*, 2013, p. 22 ; L. CAMALDO, *La creazione della procura europea in uno spazio investigativo comune*, in L. CAMALDO (eds.), *L'istituzione del Procuratore europeo e la tutela penale degli interessi finanziari dell'Unione europea*, op. cit., 2014, p. 9 ; J. GOEHLER, *European criminal justice integration 5.0 : towards a European public prosecutor's office*, *The Yale Journal of International Law*, 2015, vol. 40, n° 1, p. 195.

44 See T. ALESCI, *La procura europea per i reati lesivi di interessi finanziari: la proposta di regolamento tra luci e ombre*, *Archivio penale*, 2014, n° 1, p. 7.

45 See F. SPIEZIA, *Gli scenari per l'istituzione del procuratore europeo alla luce del Trattato di Lisbona e i rapporti con Eurojust*, in L. CAMALDO (eds.), *L'istituzione del Procuratore europeo e la tutela penale degli interessi finanziari dell'Unione europea*, op. cit., 2014, p. 145.

IV. The investigative activity and the determinations on the subject of the prosecution proceedings

Regulatory rules always have the competence to identify the conditions of exercise of the EPPO's functions, the rules of procedure applicable to its activities and to the admissibility of the sources of proof, as well as the rules applicable to the judicial review of procedural measures adopted by it in the performance of its functions⁴⁶. It should be pointed out that the European Public Prosecutor's Office, within its activities, has to respect the rights contained in the Charter of Nice and its prosecuting activity must comply with the principles of proportionality and impartiality.

Several critical issues resulted from the negotiations and we cannot find any solution in the Treaties. The solution to these issues is complicated by the diversity of the models included in the legal systems of the Member States⁴⁷. Many problems thus raise, regarding the mandatory or discretionary prosecuting activity, the identification of the eligibility criteria of materials useful to the evidence construction, the establishment of the selection criteria for the indictment court and the responsibility of the Public Prosecutor for his actions.

Article 22⁴⁸ of the Draft Regulation provides that the start of the investigations is carried out by one of the Delegated European Public Prosecutors when there are reasonable grounds to believe that an offence is or was committed within the competence of the European Public Prosecutor's Office, or given to a Permanent Chamber if none of the Delegated Prosecutors has carried it out.

Once the investigations have started, the European Public Prosecutor must immediately inform the central office, which will have to check that there is no other ongoing investigation regarding the same facts. The possibility to associate more European Public Prosecutors and more Delegated Prosecutors⁴⁹ to the investigation exists where several Member States claim their jurisdiction on the same offence or when the investigative activity has to be conducted in one or more of them. In addition, the Delegated European Public Prosecutors, during the investigations, can rely on the collaboration of the national enforcement authorities⁵⁰.

In cross-border cases, if investigative measures must be carried out in a Member State, which is different from the one where the investigation has

46 See art. 86, p. 3 TFUE.

47 In the continental model the Public Prosecutor, in addition to the prosecuting activity, also manages the activity of the police services. This function is not present in the Anglo-Saxon model.

48 See art. 22 Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, *cit.*

49 See L. HAMRNA, E. SZABOVA, *European Public Prosecutor's Office-Cui Bono?*, *European Journal of Crime*, 2013, p. 54 ; L. CAMALDO, *La nuova fisionomia della Procura europea all'esito del semestre di presidenza italiana del Consiglio europeo, op. cit.*, p. 814.

50 See R. KOSTORIS, « Pubblico ministero europeo e indagini nazionalizzate », *Cassazione penale*, n° 6, 2013, p. 4738.

started, the Delegated European Public Prosecutor who has started it acts in close consultation with the colleague of the place where the investigative measure has to be conducted. This latter disposes the investigative measures himself or designates the national competent authorities for the conduction⁵¹.

The current proposal for a regulation does not provide any reference to the profile regarding the harmonisation of the single investigative measures. While including an exhaustive list of the minimal investigative instruments which should be made available to the European magistrate⁵², Article 25 of the Proposal provides the possibility that the Member States limit the use of interception of electronic communications to the serious offences only⁵³. In several Member States, preventive interceptions are not provided by the legal system⁵⁴. Instead, in Italy interceptions are used with excellent results. Many anti-terrorism operations on the Italian territory have actually started with the preventive monitoring of some suspect fundamentalist groups. These differences in the use of such an important investigative instrument can create several shortcomings. In addition, in the text currently before the Council there is no reference to the necessity that the investigative measures, which mainly affect fundamental rights, are subject to judicial authorisation.

As prescribed by Article 28 of the Draft Regulation, the Delegated European Public Prosecutor can dispose or request the arrest or pre-detention of the

51 See art. 26 Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, *cit.* Si v. Cfr. L. CAMALDO, *La creazione della procura europea in uno spazio investigativo comune*, in L. CAMALDO (eds.), *L'istituzione del Procuratore europeo e la tutela penale degli interessi finanziari dell'Unione europea*, *op. cit.*, p. 9.

52 See art. 25, Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office *cit.*; See in particular, art. 25, § 1 : search any premises, land, means of transport, private home, clothes and any other personal property or computer system, and take any conservatory measures necessary to preserve their integrity or to avoid the loss or contamination of evidence; obtain the production of any relevant object or document either in original or in some other specified form; obtain the production of stored computer data, encrypted or decrypted, either in original or in some other specified form, including banking account data and traffic data with the exception of data specifically retained in accordance with national law pursuant to Article 15 (1), second sentence, of the Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector; freeze instrumentalities or proceeds of crime, including freezing of assets, which are expected to be subject to confiscation by the trial Court and where there is reason to believe that the owner, possessor or controller will seek to frustrate the judgement ordering confiscation.

53 See art. 25, Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, *cit.*; See in particular, § 2: intercept electronic communications to and from the suspected or accused person, on any electronic communication connection that the suspected or accused person is using. See S. ALLEGREZZA, A. CSURI, *Interception of postal communications and interception of content data, surveillance in public and private sphere*, in K. LIGETI (eds.), *Toward a Prosecutor for the European Union: Draft Rules of Procedure*, *op. cit.*, p. 145 ; J. TRICOT, A. NIETO, "Monitoring of telecommunication traffic data and of bank transactions", in K. LIGETI (eds.), *Toward a Prosecutor for the European Union: Draft Rules of Procedure*, *op. cit.*, p. 186.

54 See K. LIGETI (eds.), *Toward a Prosecutor for the European Union: a comparative analysis*, *op. cit.*, p. 72.

suspect or of the defendant, in accordance with the national law applicable in similar national cases⁵⁵. Moreover, the use of the European Arrest Warrant is provided when it is necessary to proceed with the imprisonment or the surrender of a person who is not in the Member State where the Delegated European Public Prosecutor responsible for the case has his seat.

In respect of these investigative powers, it can be claimed that the dispositions concerning the defensive guarantees are quite scant⁵⁶. Article 35 of the Draft Regulation provides that the activities of the EPPO are carried out with full respect for the rights of suspects guaranteed by the EU Charter of Fundamental Rights, in particular the right to an impartial judge and to defence, as well as all the procedural rights provided by the applicable national law. The rule expressly refers to some procedural rights present in other acts of Union law, such as the right to interpretation and to translation⁵⁷; the right to information in criminal cases; the right to have a lawyer⁵⁸; the right to inform a third party upon deprivation of liberty, to communicate with third parties and with consular authorities⁵⁹. However, in order not to move back from the European standards stated in the constitutions of the Member States and in the ECHR⁶⁰, these specific procedural guarantees must be accompanied by some others not yet present in the project, such as: the presumption of innocence of the accused; the right to attend criminal proceedings; the grant of legal aid for suspects or defendants deprived of their liberty and in proceedings executing the European Arrest Warrant⁶¹.

In the field of defensive guarantees, the right to evidence is particularly important. Article 31 of the Draft Regulation specifies that the suspect and the

55 See Z. DURDEVIC, "Arrest of the suspect and detention for questioning, pre-trial custodial detention", in K. LIGETI (eds.), *Toward a Prosecutor for the European Union: Draft Rules of Procedure*, op. cit., p. 132.

56 See art. 25, Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office cit. See CAMALDO, « La creazione della procura europea in uno spazio investigativo comune », in L. CAMALDO (eds.), *L'istituzione del Procuratore europeo e la tutela penale degli interessi finanziari dell'Unione europea*, op. cit., p. 9.

57 See Directive 2010/64/EU of the European Parliament and of the Council on the right to interpretation and translation in criminal proceedings, of the 20 October 2010 (OJEU 26/10/2010).

58 See Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, of the 22/05/2012 (OJEU 01/06/2012).

59 See Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJEU 06/11/2013).

60 See art. 6 ECHR. See F. CAGNOLA, « Le investigazioni della difesa nella prospettiva della istituzione del pubblico ministero europeo », in L. CAMALDO (eds.), *L'istituzione del Procuratore europeo e la tutela penale degli interessi finanziari dell'Unione europea*, op. cit., p. 167 ; J. MARTENSCHLAGER, « Access to relevant premises, summoning and hearing of the suspect and identification of the suspect », in K. LIGETI (eds.), *Toward a Prosecutor for the European Union: Draft Rules of Procedure*, op. cit., p. 20.

61 See V. COMI, *Interessi finanziari, procura europea, difesa: nessun passo indietro sul piano delle garanzie*, *Archivio penale*, 2013, n° 2, p. 14 ; K. LIGETI, « Final report of the project European criminal procedures and rules of procedures for the European Public Prosecutor's Office », in K. LIGETI (eds.), *Toward a Prosecutor for the European Union: Draft Rules of Procedure*, op. cit., p. 410.

defendant, in accordance with the law of the Member State where they are, have the right to submit evidence that the European Public Prosecutor's Office must take into consideration. Some interpretative doubts arise from the provision whereby the national competent judicial body is responsible for the exam of admissibility of evidence. Indeed, the Draft Regulation leaves to the national law the possibility to accept the evidence and to determine that it is not incompatible with the duty of the Member States to respect the impartiality of the judge, the rights to defence or other rights stated in the Charter. This disposition creates some problems concerning the evidence collected in a Member State, which is different from the one where the trial will take place. The doctrine⁶² agrees about the fact that the best solution would be that the use of evidence collected in a Member State, which is different from the one where the trial takes place, should be subject to the respect of the conditions of admissibility of both the national judicial laws. This *double lock* mechanism would significantly reduce the critical issues regarding the *forum shopping* aimed at obtaining the admissibility of evidence otherwise excluded in another Member State.

At the end of the investigation, in respect of Article 29 of the Draft Regulation, the Delegated European Public Prosecutor responsible for the case will submit a report to the supervisor European Public Prosecutor. This report contains a summary of the case and a project of decision to conduct or not prosecution before a national court or to consider the referral of the case, its dismissal⁶³ or a compromise⁶⁴.

Subsequently, the European Prosecutor forwards the Delegated's report to the Permanent Chamber, which proceeds, if necessary, to its own review of the case file before taking a final decision, or to give additional instructions to the Delegated European Public Prosecutor.

If the Permanent Chamber provides that it is appropriate to conduct prosecution, it communicates to the Delegated European Public Prosecutor to proceed with the indictment before a competent court of his Member State⁶⁵. Where several

62 See T. ALESCI, « La procura europea per i reati lesivi di interessi finanziari: la proposta di regolamento tra luci e ombre », *Archivio penale*, 2014, n° 1, p. 7; L. CAMALDO, « La creazione della procura europea in uno spazio investigativo comune », in L. CAMALDO (eds.), *L'istituzione del Procuratore europeo e la tutela penale degli interessi finanziari dell'Unione europea*, op. cit., p. 12.

63 Cf. article 33 *Proposal for a Council Regulation on the Establishment of the European Public Prosecutor's Office – Report on the works status*, cit., where it is pointed out that the dismissal of the proceeding is provided by the competent permanent chamber on a proposal of the deputy prosecutor who has conducted the investigation. In addition, the rule states that the dismissal deriving from a lack of evidence does not preclude further investigations started on the basis of new facts, which could not be known by the European Public Prosecutor's Office at the moment of the dismissal and that have been known later, in any case before the closing date of the criminal proceeding, provided by the Member States where the judgment can take place.

64 See art. 28, *Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office* cit.

65 See art. 30, p. 1, *Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office* cit. See C. MAURO, « Vers un parquet européen », *La Semaine Juridique Edition Générale*, 1^{er} Juin 2011, n° 26, p. 746 ; M. WASMEIRER, "The Choice of Forum by the Europe-

Member States have jurisdiction, the Permanent Chamber, in principle, decides that the prosecution is conducted in the Member State of the Delegated European Public Prosecutor responsible for the case. In addition, there is the possibility that the Permanent Chamber and a Delegated Prosecutor agree on bringing different causes together, when several Delegated European Public Prosecutors have carried out investigations regarding the same person or people, so that the prosecution is conducted before the court of a Member State which, in conformity with its law, has jurisdiction for each of those causes. These dispositions end the dispute on the choice of the court competent to proceed to trial and ensure a correct administration of justice⁶⁶.

Once it has been decided in which Member State the prosecution has to be conducted, the competent national court of that Member State is determined on the basis of the national law.

The procedural rules applicable to the European Public Prosecutor's Office end with the disposition concerning judicial review. Two options are outlined by the negotiations.⁶⁷ The former regards the possibility that judicial review on acts adopted by the EPPO in the exercise of its functions should be executed by a national authority. The latter option provides that the Court of Justice of the European Union is the only one responsible for this review on the procedural acts adopted by the European Public Prosecutor's Office⁶⁸. On this point a deep political discord remains among the Member States in the field of negotiations in the Council.

an Public Prosecutor", in L.-H. ERKELENS, A.-W.-H. MEIJ, M. PAWLIK (eds.), *The European Public Prosecutor's Office: An extended arm or a Two-Headed dragon?*, op. cit., pp. 139-161.

- 66 See V. RANALDI, *L'istituzione della Procura europea: la proposta di Regolamento COM (2013) 304 e la sua dubbia conformità al principio di sussidiarietà*, *Rivista della cooperazione giuridica internazionale*, 2014, fasc. 46, pp. 98-105; L. CAMALDO, *La nuova fisionomia della Procura europea all'esito del semestre di presidenza italiana del Consiglio europeo*, op. cit., p. 817 ; A. PRESSACCO, *La Corte di Giustizia tra procura europea e giurisdizioni nazionali*, *L'indice penale*, 2015, p. 544; K.-M. LOHSE, « The European Public Prosecutor: Issues of Conferral, Subsidiarity and Proportionality », in L.-H. ERKELENS, A.-W.-H. MEIJ, M. PAWLIK (eds.), *The European Public Prosecutor's Office: An extended arm or a Two-Headed dragon?*, op. cit., pp. 165-182.
- 67 See art. 30 p. 1 Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office cit. See A. MEIJ, *Some Explorations into the EPPO's Administrative Structure and Judicial Review*, in L.-H. ERKELENS, A.-W.-H. MEIJ, M. PAWLIK (eds.), *The European Public Prosecutor's Office: An extended arm or a Two-Headed dragon?*, op. cit., pp. 101-119.
- 68 See A. PRESSACCO, *La Corte di Giustizia tra procura europea e giurisdizioni nazionali*, op. cit., p. 555 ; A. BALSAMO, « Le regola di procedura della Procura europea tra disciplina delle indagini e formazione della prova », in G. GRASSO, R. ILLUMINATI, R. SICURELLA, S. ALLEGREZZA (eds.), *Le sfide dell'attuazione di una Procura europea: definizione di regole comuni e loro impatto sugli ordinamenti interni*, Milano, 2013, p. 438.

V. Relation between the European Public Prosecutor's Office and the other agencies.

With regard to the relation that should be created between the EPPO and the other agencies of the Union, a first issue arises from the provision of Article 86, paragraph 1 TFEU, which provides that the European Public Prosecutor's Office will be established from Eurojust.

In spite of the different type and field of competence, the two bodies could coexist, but the mutual cooperation between the two organisations should be appropriately defined. At the present state, the EPPO's competence is restricted to the Union's financial interests, but there it conducts investigations and prosecutions. Instead, Eurojust has a wide objective sphere extended to the whole cooperation started among criminal justice authorities of the Member States, as well as between these ones and the Union, but it only executes administrative functions⁶⁹.

Taking account of this partial overlap of functions between the two organisations, two different institutional solutions could be outlined. The former provides that the EPPO incorporates Eurojust⁷⁰. The latter provides the possibility that both the bodies remain independent from a structural point of view, having the possibility to be connected only from the functional point of view. In the first perspective, the national members of Eurojust can constitute a national component of the European Public Prosecutor. In the second case, the EPPO can be conceived as completely independent from Eurojust. This latter case is considered the most feasible. Thus, overlaps would be avoided, both for a better use of the instruments for the collection of computer data and of the resources of the two organisations⁷¹. However, the establishment of the EPPO alongside Eurojust would introduce a further element of complexity in the institutional structure of the Union, keeping in mind that the procedures to coordinate the two organisations should be very sophisticated.

The relations between the EPPO and Europol, Olaf and Frontex will be presumably regulated through specific agreements⁷². In particular, the relations

69 See N. PARISI, *La Procura europea: Un tassello per lo spazio europeo di giustizia penale*, op. cit., p. 12; G.-H. NILSSON, "Judicial Cooperation in the EU. Eurojust and the European Public Prosecutor", in E. GUILD, S. CARRERA, A. EGGENSCHWILER (eds.), *The Area of Freedom, Security and Justice Ten Years on: Successes and Future Challenges Under the Stockholm Programme*, Centre for European Policy Studies, 2011, pp. 73-78.

70 See P. JENEY, *The future of Eurojust*, Study PE, 2013, p. 129; C. DEBOYSER, *European Public Prosecutor's Office and Eurojust: "Love Match or Arranged Marriage"?*, in L.-H. ERKELENS, A.-W.-H. MEIJ, M. PAWLIK (eds.), *The European Public Prosecutor's Office: An extended arm or a Two-Headed dragon?*, op. cit., pp. 79-97.

71 See F. SPIEZIA, « Gli scenari per l'istituzione del procuratore europeo alla luce del Trattato di Lisbona e i rapporti con Eurojust », in L. CAMALDO (eds.), *L'istituzione del Procuratore europeo e la tutela penale degli interessi finanziari dell'Unione europea*, op. cit., p. 152; R. ADAM, A. TIZZANO, *Manuale di diritto dell'Unione europea*, op. cit., p. 575.

72 This already happens for the mutual relations between some of the mentioned agencies.

with Europol have to be clarified as, in accordance with paragraph 2 of Article 86 TFEU, the European Public Prosecutor's Office is meant to make use of the analysis and of the intelligence of this organisation. Despite Article 86 TFEU does not mention it, the relations with the European Anti-Fraud Office (OLAF) should be defined⁷³. Indeed, this office carries out the investigations in the Commission for the administrative aspects of cases, which can be an offence against the Union's financial interests, and then reports them to the national criminal authorities. As soon as the European Public Prosecutor's Office will be operating, OLAF can continue with the investigative activity, but it will have to transfer the investigations to the EPPO when it assumes the existence of an offence and it will have to do it from the very first phases⁷⁴.

The coexistence between the existing organisations and the future European Public Prosecutor's Office does not seem easy. Only specific agreements can allow these bodies to develop mechanisms, which permit a fruitful cooperation.

Conclusion

The security of the Union's citizens depends on the establishment of a European Public Prosecutor's Office with anti-terrorism tasks. Despite paragraph 4 of Article 86 TFEU allows the EPPO to be provided with an additional competence besides combating frauds against the Union, there are still too many impediments on the path to the establishment of this office. Actually, the negotiations in the Council demonstrate that there are still too many political obstacles.

The Member States are reluctant to grant competences in a strategic field such as internal security. On the other hand, establishing a European Public Prosecutor's Office without real powers to fight against terrorism or organised crime and without its own budget⁷⁵ means to accept that the Union is merely home to bureaucracy and not to European citizens. The Union needs stable mechanisms able to protect the safety of European citizens. The European Public Prosecutor's Office is one of these.

The EPPO would permit to achieve greater goals in comparison to those that each Member State can achieve on its own in the fight against terrorism.

For instance, in 2008 the *Practical Agreement on arrangements of cooperation* was concluded between Europol and Olaf, while the collaboration agreement between Eurojust and Europol came into force on 1 January 2010.

73 See 1999/352/EC, ECSC, Euratom: Commission Decision of 28 April 1999 establishing the European Anti-fraud Office (OLAF), in *OJEU* 31/05/1999.

74 See R. ADAM, A. TIZZANO, *Manuale di diritto dell'Unione europea*, op. cit., p. 576 ; N. PARISI, *La Procura europea: un tassello per lo spazio europeo di giustizia penale*, op. cit., p. 16.

75 See Conclusions of Justice and Home Affairs Council of 10 and 11 March 2016. The major problems remain in the light of article 49 49, concerning the financial resources available for the European Public Prosecutor's Office, and specifically if, in the prosecution of an offence in the frame of the Prosecutor's Office itself, it should use Community or national funds. In fact, on this point there is not a shared agreement because some States believe that it is necessary to provide the Prosecutor's Office with its own funds, thus granting its independence, while others, on the contrary, support the idea of the national funding.

The challenges posed by terrorism can be overcome only with more integration among the Member States. The establishment of the European Public Prosecutor's Office would permit to overcome the horizontal logic of cooperation in criminal matters in favour of a vertical logic of integration in different judicial areas.

Résumé

Le débat sur la sécurité de l'Union européenne a été considérablement ré-ouvert par les attentats terroristes à Paris (en janvier et novembre 2015) et Bruxelles (en mars 2016). Actuellement, l'Union ne possède pas les instruments pour prévenir de possibles attaques terroristes. De plus, les États membres ne peuvent ni prévenir ni punir ces crimes avec des mesures prises individuellement. Il faut aller au-delà de simples mesures d'urgence et d'établir un mécanisme stable. Bien qu'ils soient réalisés dans le territoire d'un seul État membre, les infractions terroristes sont développées à travers une phase de préparation articulée sur plusieurs États membres. Les auteurs ne sont pas forcément des citoyens de pays tiers, mais le plus souvent ils sont citoyens de l'UE. Jusqu'à présent, *Eurojust* et *Eurojust*, qui sont les deux organismes chargés d'améliorer la coopération entre les autorités compétentes en matière de terrorisme dans les États membres ont échoué. Cela montre que l'UE a besoin de quelque chose de plus que les organes auxiliaires. Pour ces raisons, il s'avère impératif d'affiner le cadre normatif et de créer un Parquet européen qui puisse: ouvrir des enquêtes au niveau supranational, faciliter l'échange d'informations, fournir des preuves entre les autorités chargées de l'enquête dans une procédure criminelle, prévenir et contester les crimes terroristes avec des actions efficaces. Malgré cela, la réalisation du Paquet européen avec ces caractéristiques apparaît distante. Les négociations en sein au Conseil sont bloquées par la volonté des États membres de ne pas accorder à ce nouvel organisme européen une compétence en matière d'anti terrorisme et de limiter son champ d'action. Le projet de règlement laisse ouverts d'autres problèmes. La structure du Parquet européen est complexe. En effet, le Parquet européen se compose d'un bureau central formé par un Conseil (où siègent le chef procureur européen, les substituts et un procureur européen pour chaque État membre), les Chambres permanentes et le personnel administratif. Les procureurs européens délégués en revanche travaillent au niveau décentralisé. De plus, dans le règlement les règles de procédure et celles sur l'admissibilité des preuves ne sont pas très efficaces. La proposition de règlement ne prévoit pas l'harmonisation des mesures d'investigation. Les dispositions concernant les garanties de la défense de l'accusé sont très pauvres. En plus, le projet de règlement ne précise pas quelles sont les relations entre le Parquet européen et les autres agences européennes. Précisément,

il faudra établir les mesures régissant les rapports entre le Parquet européen et *Europol*, *Eurojust* et *Frontex*. La sécurité des citoyens de l'Union passe à travers l'institution du Parquet européen ayant une compétence antiterrorisme, sur la voie pour la réalisation de ce bureau beaucoup de difficultés persistent. Les problèmes les plus importants sont de nature politique. Dans le même temps, l'Union européenne peut lutter efficacement contre le terrorisme uniquement avec des instruments stables comme le Parquet européen. Le système actuel de contraste et répression au terrorisme mené par chaque État membre, de façon indépendante, permet aux terroristes de choisir où développer les activités criminelles ainsi que de décider où s'établir après avoir commis un crime. Le problème du terrorisme peut être réglé grâce à une meilleure intégration entre les États membres.

Abstract

The European Union needs to be provided with appropriate instruments to face the recent challenges regarding the fight against transnational terrorism, and especially after the facts of Paris in 2015 and of Brussels in 2016. The need is to go beyond the simple emergency measures and to establish a stable mechanism. These serious offences, although carried out on the territory of a single Member State, develop through a preparation process distributed on that of more Member States and non-EU countries. The executing authors are not only citizens of third countries, but more and more often they are EU citizens. *Europol* and *Eurojust*, the two agencies responsible for the improvement of the cooperation among the competent authorities in terrorism matters of the Member States have failed so far, thus demonstrating that something more than ancillary bodies is needed. There is a need to create a leading European mechanism in the fight against terrorism. For these reasons, the creation of a European Public Prosecutor's Office is urgent, one that is able to start investigations on a European basis, facilitate the exchange of information among investigating authorities for evidence purposes in criminal proceedings, prevent and combat terrorist offences with effective actions. The current proposal under discussion in the Council provides the possibility that the European Public Prosecutor's Office could only act on financial offences and it regulates the creation of a decentralised structure, composed of a central Office and Delegated European Public Prosecutors in the single Member States. As regards the investigative action, a shared and priority competence is provided over the ones of the national prosecutor offices. In addition, the project contains a clause for minimum guarantee regarding the right to defence, strengthening the rights of suspect European citizens and of other involved parties. The legal basis used for the establishment of the EPPO, Article 86 TFEU, provides under paragraph

4 the possibility to extend the competences of the Office to the inclusion of other serious transnational offences, among which there are certainly acts of terrorism. The idea that the territory of the Union, or at least of the Member States which will join the *European Public Prosecutor's Office* (EPPO), can be considered as a whole judicial area for investigative purposes on offences within its jurisdiction, and that an exclusive European judicial authority can investigate there, should be seen as an opportunity for an effective response to terrorist threats. Despite this, in the analysis of the current proposal for the establishment of the EPPO, it does not seem plausible to think that it can also deal with these serious offences. Actually, the Member States are opposing this possibility and try to face the terrorism challenges by locking themselves behind national borders. On the contrary, the provision of a competence concerning the fight against these serious offences will provide the Union with an important instrument and will improve the security of the EU citizens.