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SOVEREIGNTY VS EFFICIENT CRIME-FIGHTING

The Dysfunctions of Cooperation in Criminal Matters

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I. Introduction

The European Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States. The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws. [1]

Police cooperation and judicial cooperation in criminal matters has a long tradition and history. Extradition agreements were already concluded in the 19th century, and in the 20th century a cooperation network was developed partly within the framework of the Council of Europe, partly by bilateral and inter-agency agreements as well as UN treaties. However, the creation of an area of freedom, security and justice means that traditional principles are refuted. The direct contact established through the ministries of the Member States has been replaced by a three-tier system of relations. In addition to the horizontal, interstate level, two other levels have been developed: direct contacts have been established between supranational institutions (Europol, Eurojust, OLAF, joint investigation teams, FRONTEX) and also between local bodies, police, prosecution offices and courts.[2]

I.1. Police Cooperation

The foundations of police cooperation between Member States were created outside the EU, by intergovernmental cooperation in order to fight against terrorism and other acts of violence (see TREVI Convention) as well as by the relevant provisions of the Schengen Convention. Serious transnational crime, organized crime, terrorism, international sport, music and political events that require great police presence and the elimination of internal borders call for a more intensive cooperation.

The contractual framework of police cooperation is stipulated in Article 87 of the Treaty on the Functioning of the European Union (TFEU). In accordance with this article, the Union shall establish police cooperation involving all the Member States' competent authorities, including police, customs and other specialised law enforcement services in relation to the prevention, detection and investigation of criminal offences.

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[1] The Treaty on the Functioning of the European Union, Article 67.

[2] Kende-Szűcs: Introduction to the policies of the European Union, (Budapest: Complex Publishing Company, 2011) p.692.

I.2. Judicial cooperation in criminal matters

Judicial cooperation evolving in the EU is especially remarkable because it is realized by relegating the dogmas of criminal law and sovereignty (the principle of ne bis in idem, the prohibition on the surrender of own nationals). The basic concept is to create a unified law enforcement and criminal justice area, whose emergence has three main reasons: the internationalization of crime, a less effective traditional cooperation in criminal matters and the EU's intentions to protect its own interests (financial and confidential).[3]

The ultimate aim of judicial cooperation in criminal matters within the EU is to ensure a high level of security, therefore the EU adopts measures in the following fields: establishing regulations and procedures for the mutual recognition of all types judicial decisions and resolutions within the EU, preventing and settling conflict between the jurisdiction of different Member States, facilitating cooperation between the judicial and other authorities of different Member States in criminal procedures, and implementing judgments and resolutions.

The EU may establish minimum rules for criminal facts and punishments in the case of serious crimes having a cross-border dimension, resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

These areas of crime are the following: terrorism, trafficking in human beings, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime, organised crime and sexual exploitation of women and children.[4]

The EU takes an active part in law development in the field of judicial cooperation in criminal matters, it has adopted a number of framework decisions and directives in order to make cooperation more effective and stronger. Since the EU has adopted numerous laws in this field and the States have made an effort to implement the Strasbourg case law in their own law and order, the cooperation system within the EU has become extremely complex. Moreover, we cannot be absolutely sure that the legal institutions created by the EU will answer all the questions emerged, tackle all the problems and will make cooperation between Member States more simple and direct.

By presenting an anonymized legal case based on reality, in this study we aim to analyze some legal institutions in criminal matters that have already been adopted or are still to be

[3] Kende-Szűcs: Introduction to the policies of the European Union, (Budapest: Complex Publishing Company, 2011) pp.696-697.

[4] Kende-Szűcs: Introduction to the policies of the European Union, (Budapest: Complex Publishing Company, 2011) p.697.

adopted by the EU and their implementation or functioning has raised serious problems. The dysfunctions of legal institutions reveal the fact that effective cooperation is often hindered by the Member States' natural fear of losing their sovereignty, therefore political decisions tend to override professionalism and lead to the formation of emptied legal institutions which are difficult to use.

II. Study case

Miss Madame was born in Strict Land, in the EU and was a citizen of this country. However she lived and worked in Permit Land, where she built up a very successful business career as a top manager. Her success was mainly based on her exceptional skills to organize work. In her town of residence she was controlling hundreds of meters of display, girls in the windows offering their sexual services to the public. And not only that. Miss Madame organized their accommodation, food, medical care, travel from their home countries to the workplace, she chose them, provided them with contracts and made sure their workplaces were clean. This successful business woman was running a legal business, trying to meet the demands of the market, and she was a "well-respected" entrepreneur. However, Miss Madame failed to meet her tax paying obligation to the full. Although Miss Madame was conducting business activity in Permit Land, she kept her books and her fortune in Strict Land.

One day, she received a summon for hearing from the investigation authority of her home country and was suspected to have committed the crime of sexual procurement. She did not turn up at the hearing, therefore the investigation authority issued a European arrest warrant against her. The authority of Permit Land examined the warrant and decided that Miss Madame was staying and working legally in Permit Land. Permit Land did not take any action to arrest or surrender Miss Madame, since the offence described in the warrant was not considered a criminal act in this country. According to the criminal code of Strict Land, however, Miss Madame's conduct and behaviour qualified as businesslike sexual procurement and could be punished by 1 to 5 years in prison. According to the law in Strict Land, Miss Madame committed a crime by acquiring people to engage in sexual acts with others in order to make profit. Strict Land started criminal proceedings against her because in accordance with the criminal code of Strict Land, procedure shall be started against the country's own citizens committing a crime in a foreign country, even if the act is not considered a crime in the foreign country. Miss Madame's business success arouse interest in Permit Land and authorities recognized that she had paid less tax than she should have after her business revenue. By partly failing to fulfill her obligation to pay VAT, Miss Madame caused serious

damage for Permit Land and for the EU budget as well. Thus authorities of Permit Land also started criminal proceedings against Miss Madame. Miss Madame was charged with sexual procurement in Strict Land and tax fraud in Permit Land.

Since Miss Madame's criminal case affected more than one Member State, cooperation between Member States had to be concerted. At present, this can be carried out through a number of legal institutions in the EU.

II.1. Legal assistance in criminal matters

The most significant document regulating legal assistance in criminal matters between Member States is the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union supplemented by the 16 October 2001 Protocol.

The purpose of the Convention was to take more effective action against cross-border crime by creating a more successful, simple and faster cooperation in criminal matters, without prejudice to the rules protecting individual freedom. The introductory provisions of the Convention point out that it is the Member States' common interest to ensure that mutual assistance between them is provided in a fast and efficient manner compatible with the basic principles of their national law, and in compliance with the individual rights and principles of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Convention on Mutual Assistance in Criminal Matters contains the following rules: the first part on general legal assistance is aimed to simplify the delivery of official documents both in criminal and infringement proceedings and make correspondence between the different authorities of the Member States more direct. In accordance with the provisions of the Convention, documents may be sent by post directly to the addressee, information may be exchanged and contact may be established directly between courts, police and customs authorities.

In our case Permit Land – in order to start criminal proceedings against Miss Madame - may only ask for her books and for the freezing of her fortune through legal assistance. Due to the cooperation difficulties between the two member states caused by failure to fulfill the European arrest warrant, legal assistance takes up a long time. In addition, if Miss Madame is found guilty of tax fraud, a further assistance will be needed for the confiscation of her fortune. The cooperation between member states will lead to a prolonged investigation procedure.

II.2. Surrender

Surrender procedure is regulated by the Council Framework Decision on the European arrest warrant and the surrender procedures between Member States, adopted on 13rd June 2002. The aim of the decision was to improve and simplify judicial procedures. The European arrest warrant replaces the extradition system and requires each national judicial authority to recognise and act on, with a minimum of formalities and within a set deadline, requests made by the judicial authority of another EU country. A person who has committed a serious crime in an EU country but who lives in another, can be returned to the first country to face justice quickly and with little administrative burden.[5]

The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order. The definition of the European arrest warrant outlines two purposes: arrest for the purposes of conducting a criminal prosecution and arrest for the purposes of executing a sentence that has already been passed. In the first case a European arrest warrant may be issued for acts punishable by at least 12 months custodial sentence, in the second case the sentence still to be executed shall be of at least 4 months.

If we consider the case described above, it is quite obvious that there are still cases where for some reasons – contrary to the international practice – a person is only surrendered if the crime committed by him is considered a crime in both countries.

II.3. Joint Investigation Teams

The Council Framework Decision adopted in 2002 provided for the possibility for Member States to set up joint investigation teams with a view to combating international crime, at the beginning only in the case of trafficking in drugs and human beings as well as terrorism, later also in the case of other crimes.

Competent authorities of two or more Member States may set up a joint investigation team by mutual consent for specific purposes and a limited time period which may be renewed with the agreement of all the parties involved. The aim of a joint investigation team is to conduct investigation in criminal cases in the member states which set up the team. A joint investigation team is set up in particular where a Member State is conducting a difficult and

[5] Kende-Szűcs: Introduction to the policies of the European Union, (Budapest: Complex Publishing Company, 2011) p.703.

demanding investigation into criminal offences affecting more than one Member States, or a number of Member States are carrying out investigations into criminal offences in which the circumstances of the case necessitate coordinated, concerted action in the Member States involved.[6]

This might be a problem also in the investigation of the crime described above, since the investigation procedure and the collection of evidence should be carried out in a state where the act committed by the suspect is not considered a crime. National judicial authorities (courts and prosecution offices) as well as Eurojust should be involved in the projects as early as possible so that the joint investigation teams can operate effectively. In the case of cross-border crimes related to fraud and corruption, technical and operational assistance from OLAF may add extra value to the investigations in the joint teams, thus fostering the success of their work. Although in some EU countries OLAF cannot be engaged as an expert in the criminal procedure, its expert opinion may be used only as documentary evidence. Setting up joint investigation teams is a result of a voluntary cooperation between Member States, in our case states were not willing to cooperate, therefore no joint team was set up.

II.4. European Investigation Order

The Directive of the European Parliament and the Council regarding the European Investigation Order in criminal matters ("the EIO") was initiated in 2010 as a proposal for directive. The EIO would replace the existing legal framework applicable to the gathering and transfer of evidence between the member states. It proposes an order to be issued for investigative measures which aim to gather evidence in a member state (the "executing authority") as well as acquiring of the evidence already possessed by the executing authority. The EIO is based on the principle of mutual recognition, replacing traditional European criminal regime. Basically, the currently applied request for legal assistance would be replaced by legal assistance orders sent to executing authorities by the authorities of member states. This may result in diminishing the control of requests (compared to the individual decision over the requests).

The EIO proposes to unify the traditionally fragmented system of evidence sharing, however it is not yet clear if it may achieve its purpose or makes the cooperation more complex.

The resolutions regarding the proportionality of the imposed European Investigation Orders can be different as many of the member states represent liberal conceptions while others

[6] Kende-Szűcs: Introduction to the policies of the European Union, (Budapest: Complex Publishing Company, 2011) p.701-702.

represent paternal ones. In case of inquisitorial criminal process the prosecutorial and judicial oversight on investigative measures are tighter than in the case of accusatory criminal processes, thus proportional measures on national level will not necessarily be such within a multipolar international context.[7]

Compared to the Mutual Legal Assistance the EIO provides for rationalization of the grounds for refusal. The list of grounds for refusal is short under the Mutual Legal Assistance; however those grounds provide many circumstances for refusal, especially by referring to sovereignty and public order. The EIO provides that the executing authority has a possibility to use another measure than the one mentioned in the EIO if the measure concerned does not exist in the law of the executing State or if the measure concerned is limited to a list or category offences which does not include the offence mentioned in the EIO. But such alternative measure will not always exist. If there is no alternative measure, the execution of the EIO may be refused.

The principle of mutual recognition also means that the executing authority has to recognize the ruling of the legislations of another member state if it issues an EIO against an offence that is not regarded as criminal offence in the executing state. The question arose, what is the fundamental principle under another state is obliged to take investigative measures by its own authorities against offences which are regarded as non-criminal ones in that state? That is the "mutual recognition of punishability" at the expense of member state value-judgment. Under Article 9(1), the executing authority shall recognize an EIO without any further formality being required, and shall forthwith take the necessary measures for its execution in the same way and under the same modalities as if the investigative measure in question had been ordered by an authority of the executing state.

The principle of assimilation provides that if a piece of evidence is obtained by an EIO in another state, the rules of procedure of the executing state prevail unless special request is made for applying the rules of procedure of the issuing state. Being an EU member state, the procedural law of an executing state regarding the protection of human rights shall meet the guarantees of the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union due to all member states are parties of the Convention and the Charter oblige states under the treaty. The mutual recognition principle implies that in case of

[7] Karsai Krisztina: Emberi jogok védelme és az európai nyomozási határozat [Krisztina Karsai: Protection of Human Rights and the European Investigation Order]; in: Rendészet és emberi jogok [Law Enforcement and Human Rights] No. 2012/3., p.23-33.

applying the procedures of the issuing state, the executing authority has to assume that the rules of procedure in the request meet the human rights standards; hence human rights conformity has to be presumed. The executing authority neither can review the legality of the orders of another member state, nor consider if human rights standards are respected in criminal proceedings in another member state. All of these have to be presumed as these derive from the principle of mutual trust in criminal justice systems of member states.

According to the legal case, Miss Madame stores her assets originated from service activities in Strict Land. Permit Land orders to secure the assets by freezing in the investigative procedure for criminal tax fraud. Assistance in criminal matters is the only instrument that can be used in such measures, however the fulfilment of legal assistance progressing slowly due to the difficulties in cooperation between the two states. Thereby the situation raises the question of the necessity and efficiency of the EIO due to asset recovery issues are outside its competence, thus traditional legal assistance would remain in effect also in this area.

III. The protection of financial interests of the European Union

The European Union has its own resources in order to fund its operation. These resources collected and transferred to the budget of the EU by the member states are the own resources of the EU by law.

Basically, the EU's sources of income can be divided into three different parts, as follows:

1. **'Traditional' own resources:** these are mainly import customs and duties imposed on products coming from the external borders /i.e. out of the customs territory/ of the EU. In 2014 the 'traditional' own resources amounted to 11,4% of the total income of the EU.
2. **Value added tax based resources:** there is a 'Common Customs Tariff' (uniform rate) which is levied on the harmonised value added tax related income of each member state. In 2014 the value added tax based resources amounted to 12,3% of the total income of the EU.
3. **Gross National Income** /hereinafter: **GNI/ based resources:** there is also a common levy on Member States' GNI of a uniform percentage. However, it meant to be a compensatory contribution, in time it has become the largest source of budget revenue and nowadays it consists the 76% of the total budget revenue.

In addition to the above mentioned resources the personal income tax of the staff employed by the EU, the contributions paid by third countries participating EU policy-programs as well as the administrative fines imposed on companies when they fail to comply with EU rules are also forming part of the budget revenue of the EU.[89]

As we can see by observing the revenue structure the value added tax based resources are an important component of the EU's budget. Thus, due to the VAT infringement committed by Miss Madame in Permit Land, a criminal procedure will be launched against her and this procedure will have a significant EU law related aspect as well. Therefore, the financial loss caused by the VAT fraud damages not only the budget of the member state, but also the budget of the EU. As we mentioned earlier the related accounting documents can be found in an other member state, namely in Strict Land. Based on this fact the present case raises further important questions regarding the mutual assistance in criminal matters between member states.

The protection of financial interests of the EU is key question, an important issue among the problems of the EU waiting to be solved for a long time. Because crimes committed against the budget of the EU are a major source of serious problems. The EU has its own budget (financial autonomy) which is independent from the member states. Consequently, it has become subject of a particularly varied criminal activity among criminals.

At the beginning the so called sectoral directives served the protection of financial interests. Nevertheless, the lack of unified regulation and the Commission's different powers of inspection led to different level of protection among member states. Moreover, because of the enlargement of the EU and the expansion of EU's budget sectoral directives were not enough to ensure protection. Therefore it was a growing need to create a common regulatory framework for unified protection.[10]

In order to solve this problem the Convention on the protection of the European Communities' financial interests /hereinafter: the **Convention**/ was enacted in 1995.[11] Regarding the enactment of the Convention it can be concluded that the prolonged national ratification

[8] http://ec.europa.eu/budget/library/biblio/publications/glance/budget_glance_hu.pdf (Date of download: 3rd March 2016.)

[9] http://www.europarl.europa.eu/atyourservice/hu/displayFtu.html?ftuId=FTU_1.5.1.html (Date of download: 3rd March 2016.)

[10] Karsai Krisztina: Mozaikkép a közösségi pénzügyi érdekek büntetőjogi védelméről, Európai Jog, Hungary 2002. Volume 5, p.14.

[11] HL 1995 C 316, 1995.11.27.

processes caused serious delay regarding the entry into force of the Convention. The vast majority of member states has not even properly ratified the text of the Convention and its protocols (amendments) so there are still huge differences concerning the level of criminal protection within the EU. This phenomenon clearly hinders the unified and effective protection and it leads to the conclusion that some member states are imposing more severe punishments for these crimes while the others are imposing more lenient ones. There is also a small number of member states where these criminal activities are decriminalised. This contrast endangers the whole European integration and the internal market which is an essential prerequisite of the integration.

The real danger is not a possible decline in revenues. The existing national rules against budget fraud are not provide a level playing field related to the protection of financial interests. As a result of this capital will be allocated where the rules are the most lenient. This process could undermine the (internal) market equilibrium. [12]

To sum it up, the Convention could not ensure the unified and effective protection of financial interests. Realizing the need of a common regulatory framework for these criminal acts the Commission drafted a proposal for a directive[13] in 2001 but this proposal has not been adopted.

The Treaty of Lisbon /hereinafter: the **Treaty**/ (entered into force on 1 December 2009) was also redefined and strengthened the internal policy concerning the protection of EU's financial interests.[14] The Treaty significantly strengthened the EU's jurisdiction at this field and established the legal grounds for a supranational criminal regulation. In 2012 the Commission based upon his jurisdiction (article 325 of the Treaty on the Functioning of the European Union) drafted a new proposal in order to set aside (repeal) the Convention and its protocols.[15]

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[12] Dr. Miskolczi Barna (2010): Aktuális kérdések az Európai Ügyészségről In: Ügyészek Lapja, Hungary, Volume 2 p.58.:

[13] Proposal for a Directive of the European Parliament and of the Council on the criminal-law protection of the Community's financial interests (COM (2001) 272.

[14] Jacsó Judit (2012): Gondolatok az Európai Unió költségvetésének büntetőjogi védelméről a Lisszaboni Szerződés tükrében, in: Tanulmányok Dr. Dr. h. c. Horváth Tibor professor emeritus 85. születésnapja tiszteletére, Bíbor Publishing Company, Hungary, Miskolc, p.65.

[15] Proposal for a Directive of the European Parliament and of the Council on the fight againts fraud to the Union's financial interests by means of criminal law [COM(2012) 363.]

The Proposal redefines the concept of fraud affecting the European Union's financial interests, which is essentially the same as the definition used in the PIF Convention,[16] according to which fraud is a fraudulent conduct with respect to both expenditure and revenue. The criminal conducts offending both sides are largely identical and the difference is primarily shown in the results: expenditure fraud results in misappropriation or wrongful retention of funds while revenue fraud results in wrongful reduction of funds.

Not only fraud in its strict sense is covered by the Proposal, but also four other fraud-related forms of illegal behaviour through which the EU budget is damaged: dishonest conduct of tenderers in public procurement, money laundering, passive and active corruption and misappropriation.[17] The Proposal provides for the criminalisation of offenses mentioned above as well as the punishment of natural and legal person perpetrators. Similarly to previous documents, the Proposal obliges member states to punish offences by applying effective, proportionate and dissuasive criminal sanctions.

It is also important to mention that the PIF Convention and its Additional Protocols are still in force due to the adoption of the proposed directive drags on for several years. Debates over the adoption clearly show how important is for member states to protect their sovereignty in matters concerning criminal law.

IV. The European Public Prosecutor's Office

The Member States are not only key players in the common budget inflows and outflows from the EU funds, but they are also the guardians of public budgets as well.

According to some, the latter, however is exercised with a very low efficiency.[18] It is therefore particularly important task to create an appropriate action against crimes affecting the financial interests of the EU, in which the member states play a major role besides the EU. In order to remedy the deficiencies the creators of Corpus Juris came up with the idea of setting up a European Public Prosecutor. The Article 86 of the Treaty on the Functioning of the European Union – through the Lisbon Treaty – allows the Council to create -with a special legislative procedure- the European Public Prosecutor's Office from Eurojust (EPPO). This

[16] Article 3 of the Proposal

[17] Article 4 (1)-(4) of the Proposal. These delicts are referred as "fraud offences affecting the Union's financial interest."

[18] Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office – Explanatory Memorandum, Brussels, 17.7.2013 COM(2013) 534 final p.2-5.

action is made to combat crimes affecting the financial interests of the EU regulations. In July 2013 the European Commission presented its proposal for the establishment of a European Public Prosecutor. The European Public Prosecutor's Office would be an independent, decentralized legal entity and would be responsible for prosecuting the crimes affecting the financial interest of the Union, in which belongs the investigation, the criminal charges, the closing of the case, the prosecution, and the right of appeal. The EPPO would prosecute in front of the national courts with the application of the procedural and substantive law. Furthermore it would instruct investigative actions similar to the national prosecutor's office. In addition, the EPPO would rely on Europol, Eurojust, or even on OLAF. Thus, according to the Commission's consideration it would be an effectively functioning organization with adequate power. However, during the negotiations of the proposed regulation of EPPO a number of problematic points arose, and in the following we would like to discuss primarily the questions of EPPO's competence and the structure of the organisation.

IV.1. The competence of the European Public Prosecutor's Office

According to the Commission's proposal the competence of the EPPO will be defined by the provisions of the Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law (PIF Directive). However, negotiations on the PIF Directive are yet to be concluded, and currently there is an intense debate on what kind of criminal offences should fall within the scope of the Directive. It is an important issue, whether harmonization should cover VAT fraud cases, and if the answer is yes, then its exact conditions are still in question.

Part of the Member States' revenues from VAT is paid into the EU budget with the application of a uniform rate to the harmonised VAT assessment bases determined according to EU rules. VAT is set out and collected, then partially transferred to the EU budget by the national authorities. However opinions are divided on whether VAT is to be qualified as a community revenue. Some say that regarding VAT is just indirect revenue of the EU budget, and its amount almost entirely (above 99%) goes into the national budgets, VAT fraud should not be considered as an offence against the Union's financial interests by the PIF Directive. Others believe – in accordance with the Commission's proposal, and with the ECJ's arguments in the Case C-539/09.- that VAT fraud must be considered as an offence against the Union's financial interests, and therefore it should fall within the scope of the PIF Directive. ECJ's judgement states in par. 72. that "there is a direct link between, on the one hand, the collection of VAT revenue in compliance with the Community law applicable and,

on the other, the availability to the Community budget of the corresponding VAT resources, since any lacuna in the collection of the first potentially causes a reduction in the second." Considering this, VAT comes under the Union's financial interests, as it is a component of the EU budget. It is notable however that Member States pay only less than 1% of the collected VAT into the Community budget.[19]

If VAT fraud comes under the PIF Directive, it means that prosecutions in these criminal offences fall within the competence of the European Public Prosecutor's Office, instead of national authorities. This was the idea of the original Proposal but in the meantime many Member States expressed their concern for sovereignty, so currently the amended provisions of the Proposal does not cover VAT fraud. Although considering that most of the criminal conducts affecting the Union's budget are based on VAT fraud, the exclusion of these offenses from the scope of the Directive and at the same time from the competence of the EPPO, may lead to the emptying of the EPPO's competence, querying the reason of its existence. The European Commission and those Member States who considers the strengthening of the Community competences is more important than the emphasising of subsidiarity, have serious ambition to draw VAT fraud within the scope of the PIF Directive even with compromises. Such compromises could be the introducing of a threshold in relation to the value of the damage caused, or requiring the criminal conduct to have cross-border nature. Nevertheless, these changings bring on more questions e.g. what kind of damage could be the basis of the threshold, how much this threshold value should be, etc. However, MSs - fearing for their sovereignty- not really seem to be open for these compromises, and regard these discussions needless.

At the moment Hungary's official stand is – *not in accordance with the opinion of the Office of the Prosecutor General* – that taking subsidiarity and proportionality into consideration, the EU cannot bring VAT fraud under Community regulation in any way, because these offences cause damage directly to the national budgets, only indirectly affecting the EU budget in a much lower scale. So taking away this criminal offence from the national authorities' competence would seriously hurt the sovereignty of the MSs, additionally it would be completely causeless. The – *arguable* – fundamental assumption behind the establishment of EPPO is that the MSs' authorities do not do everything to fight against the criminal offences

[19] European Union Public Finance 4th Edition p.240. http://ec.europa.eu/budget/library/biblio/publications/public_fin/EU_pub_fin_en.pdf#page=234 (Date of download: 1st March 2016.)

infringing the Union's financial interests.[20] [21] This point of view is particularly inappropriate in the cases of VAT fraud where the damage caused by one criminal offence to the national budget is much more significant than the damage caused to the EU budget. So if we would accept the abovementioned assumption of the Commission, we should see that the national authorities could do a better job in pursuit of VAT fraud than EPPO could do, because national authorities are more interested.

Those who oppose VAT fraud to fall within the competence of the EPPO cannot agree with the argument that an independent European authority can step up more efficiently in fighting cross-border crimes than national authorities. It is unclear how much added value can we expect from merely establishing a new organization, which will proceed using the same national material and procedural law which was used by national authorities. What will make the investigations and prosecutions more efficient? A new organization and labelling prosecutors European prosecutors will not result automatically in the improvement of crime-fighting.

However, in case of VAT fraud gets excluded from within the scope of the PIF Directive and at the same time from the competence of the EPPO, this raises the questions, what sense does establishing the EPPO make and how effective could it be in the fight against crimes infringing the Union's financial interests? Would not be a better option to enhance the already existing methods of cooperation between the MSs, or to try to exploit them more efficiently?

We believe that the EU should create such a European Public Prosecutor's Office which can produce real added value in crime-fighting. Taking this into consideration we think that EPPO's competence should cover at least the so called carousel fraud cases which can be committed because of the characteristics of the Community. In order to the EPPO be able to step up more efficiently against these crimes than the national authorities do, it is necessary to work out additional qualities which guarantee that this new form of cooperation will be more effective.

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[20] Communication from the Commisssion to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Better protection of the Union's financial interests: Setting up the European Public Prosecutor's Office and reforming Eurojust Brussels, 17.7.2013 COM(2013) 532 final p.3-5.

[21] Commission Staff Working Document Impact Assessment Accompanying the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office; Brussels, 17.7.2013 SWD(2013) 274 final p.15-22.

Regarding those VAT fraud cases which has no Community dimension, i.e. only one Member State is affected by the criminal offence, we do not feel necessary to bring these types of fraud under the EPPO's competence, moreover we would consider this unsuitable. These criminal offences should stay in the national authorities' competence, because in these cases the EPPO would not enhance the efficiency of crime-fighting, moreover it would put an unwanted burden on the EPPO if it had to proceed in these cases. For another thing - as it was already mentioned above- it is not questionable that the Member States have interests in the cover-up of VAT fraud offences and the punishing of the perpetrators, considering that these crimes cause damage primarily to the national budgets.

In our opinion it would be expedient, if a threshold amount of damage is introduced in relation to the criminal offences in the competence of the EPPO. This would mean that small cases do not burden needlessly the EPPO. It should be guaranteed by the adequate harmonisation of the material and procedural law of the Member States that every MS takes the necessary actions against criminals in these small cases.

Article 86 (4) TFEU makes it possible to extend the powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension. It is worth contemplating that if EPPO's competence will not cover VAT fraud cases then the emptying of the institution could be avoided by extending its competence to certain forms of cross-border crime. We believe that a Community approach could be beneficial in combating human trafficking, human smuggling, drug trafficking, etc. Although, this could bring significant results only if the EPPO can provide some kind of added value in crime-fighting. Establishing the EPPO in itself, without the adequate operational conditions will not guarantee more efficient and successful actions against criminals.

The decision on the competence of the EPPO will be taken by politicians guided by political aspects, because in a certain way Member States' sovereignty is in question. On the other hand, taking a decision like this would require professional aspects to be taken into consideration, as too much fear from losing sovereignty could result in establishing an EPPO which could not provide a real progress in crime-fighting.

In our case described above, it is not indifferent whether Miss Madame's tax fraud offence will fall within the EPPO's competence or not? If the EPPO's competence cover *every* VAT fraud cases, then the answer is yes. If not, then the question is whether a threshold is introduced or not, and cross-border dimension is required or not? In case of the EPPO's competence will cover our case, then we wonder what will make the EPPO's actions more

efficient than the national prosecutors' procedure. Accounting documents are located in Strict Land. The European Prosecutor can give instructions to conduct investigative actions in the territory of Strict Land, so ideally the relevant documents can be obtained faster than using the legal aid system. However, we believe that the EPPO should not deal with these kind of "small" cases as we already mentioned above.

IV.2. The structure of the European Public Prosecutor's Office

EPPO's structure has a critical importance in the operational functioning of the organization, in its efficiency, and it is also significant regarding the question of sovereignty. The latter makes the issue of the structure the subject of political arguments.

There is a general view that the structure should be – in some degree – decentralised, considering that the necessity of applying national law and working together with national authorities requires prosecutors at operational level to be in close connection with the Member States judicial systems. Of course, the degree of decentralisation is the subject of discussions. Some of the MSs prefer a more centralised and independent organisation, while others – holding on to their sovereignty – imagine a more decentralised model.

The European Commission's Proposal, submitted in 2013, suggested a hierarchical structure for the EPPO, headed by the European Public Prosecutor. Negotiations on the structure resulted in notable amendments to the Proposal, as the vertical structure has been changed to a collegial one.

Horizontal structure evidently strengthens the participation of the MSs in the activity of the EPPO, however it makes the functioning more difficult and less effective. This type of decision-making mechanism is hardly compatible with the hierarchic systems customary for prosecutor's offices in national level, so this can lead to loss of efficiency.

At the moment there is a risk that the decision on the structure of the EPPO will be taken with political compromises by the politicians, thus overshadowing the professional aspects. Unfortunately, political decisions motivated by excessive fear from losing sovereignty can result in the functioning of the organization becoming difficult and inefficient.

IV.3. Enhanced cooperation

Article 86 (1) TFEU makes it possible that in the absence of unanimity in the Council, a group of at least nine Member States may request that the draft regulation be referred to the European Council. In that case, the procedure in the Council shall be suspended. After

discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council for adoption. Within the same timeframe, in case of disagreement, at least nine Member States can establish enhanced cooperation on the basis of the draft regulation concerned. Later, other Member States still have the opportunity to join the cooperation.

In the case we presented above it has great importance whether the EPPO is set up in an enhanced cooperation or in the primary way. In case of an enhanced cooperation, EPPO could only operate efficiently if Permit Land takes part in the cooperation, furthermore it will not have right to proceed in the territory of Strict Land unless Strict Land takes part in the cooperation. As long as only either one of them takes part in the EPPO -considering the abovementioned problems- the investigation remains just as slow and problematical as before. In this situation only the conventional methods of criminal cooperation would be available. Therefore the new European institution will not fulfil the expectation of making procedures more efficient.

V. Further solutions

Majority of the Member States support the idea of establishing the European Public Prosecutor's Office, which means that in spite of all the differences the chances are that sooner or later the EPPO will be set up, even if it could be realised only in the form of enhanced cooperation. Nevertheless, it is worth analysing which fields of the European cooperation in criminal matters should be developed, in order to the objectives of the EPPO may be realised, even if the EPPO could not be set up eventually.

In case of the Member States could not agree unanimously on the EPPO Regulation, it might be a solution for MSs who will not take part in the enhanced cooperation to work together with each other's authorities in a so called network-model. This would be the cooperation of the Member States' prosecutor's offices in a JIT-like system which could enhance the efficiency of criminal procedures, reduce the length of the investigations, and it could make easier the recognition of the evidences. Regarding the flexibility of the system, changes to the criminal offences within the scope of the PIF Directive would not cause any problems. A central record system would help the avoidance of parallel procedures and the optimisation of capacities. However, network-model is not an alternative for the EPPO but a new model of judicial cooperation for those Member States who do not want to take part in the enhanced cooperation establishing the EPPO, because of their fear from sovereignty-loss.

Reshaping Eurojust is a case at issue. The Proposal for the Regulation on the Eurojust was submitted in the same time as the Proposal for the Regulation on the EPPO, regarding that Article 86 (1) TFEU declares that the European Public Prosecutor's Office may be established from Eurojust. Primarily this meant that the – HR, financial and IT – infrastructure of Eurojust would have been assigned to the EPPO in some measure. As negotiations progressed, it became clear that the establishment of the EPPO will be much more expensive, setting up and operating the organisation could not be financed by a simple rearrangement. Nevertheless, the main idea behind the reform of Eurojust is to divide its operational and administrative functions what will result in a more efficient functioning. Undoubtedly, Eurojust is one of the most successful achievements in the area of cooperation in criminal matters, so it has vital importance to keep Eurojust, moreover if it is possible its efficiency should be enhanced.

VI. Conclusions

On the grounds of the case presented above, we had a look at the EU's most important available and/or upcoming instruments in the area of cooperation in criminal matters. We aimed to point out the problems which may surface in practice, regarding the functioning of these legal institutions. Apparently, there are several already accepted instruments in the EU regarding cooperation in criminal matters, and there are many important proposals under discussion. The negotiations are often determined by the MSs' concern for losing sovereignty that is understandable, considering that MSs are not willing to give up their rights and powers related to criminal jurisdiction. However, we would like to highlight as the moral of the abovementioned problems that decision-making, based on political compromises, should not lack the professional aspects, otherwise there is a serious risk of empty and useless legal instruments coming into effect, which will hardly improve the cooperation in criminal matters.

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