

The European Public Prosecutor's Office: An institution built on sand?

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"And the rain descended, and the floods came, and the winds blew, and beat upon that house; and it fell: and great was the fall of it." (Matthew 7:27 KJV)

Introduction

The European Union has traditionally had a limited role in the area of criminal justice enforcement. Many other areas of EU law involve detailed legislation and direct involvement, but in relation to criminal law the EU has thus far been limited to a coordinating and harmonising role. There are, for example, certain minimum standards set on the national definitions of some serious criminal offences, and an attempt has been made to harmonise the types and level of sanctions applicable to certain offences, but when it comes to actually prosecuting these crimes the Member States still reign supreme. In Ireland, the job of prosecuting criminal offences in the Courts falls ultimately on the Director of Public Prosecutions (DPP). This could be set to change, however, as a regulation is currently (slowly) working its way through the EU legislature that would set up a European Public Prosecutor's Office (EPPO), which could effectively operate as a sort of DPP for the entire European Union. My research seeks to critically analyse this EPPO regulation in order to evaluate its potential impact on the Irish criminal justice system, with a view to making a recommendation as to whether or not Ireland should accede to this Office in the future.

The Lisbon Treaty and draft regulation

The potential for the establishment of a European Public Prosecutor's Office was introduced into the text of the Treaty on the Functioning of the European Union (TFEU) by the Treaty of Lisbon. Article 86(2) TFEU states:

The European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment [...] the perpetrators of, and accomplices in, offences against the Union's financial interests [...]. It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences.

Following the coming into effect of the new Treaties, the European Commission published a recommendation for a Council Regulation (a draft Bill) establishing the EPPO in 2013. This recommendation was adopted by the European Parliament, and is currently undergoing (extensive) revisions by the relevant Member State government Ministers in the

Council of the European Union. The regulation, as drafted by the Commission, sets up a unique framework within which the EPPO will operate. Although the EPPO will be a supra-national Office, in practice it will be inserted into the various national criminal justice systems. This is an important innovation on the part of the Commission since, in the hierarchy of laws, even the lowest EU law ranks above the highest national law, as established by the European Court of Justice in the 1964 *Costa* case. Without this unique proposed setup, the procedural rules surrounding the EPPO could have been in conflict with (and would have taken precedence over) national constitutional standards, which for many would simply be politically untenable (particularly in a country like Ireland, where the Constitution is so directly linked to the concept of popular sovereignty, since Bunreacht na hÉireann may only be amended via national referendum). Although the draft law sets out that the EPPO will be subject to almost all national law, however, rules of evidence will still be governed at EU-level in order to ensure that evidence gathered legally in one Member State would be admissible in the Courts of another. This leaves open the possibility of constitutional tensions in relation to the admissibility of evidence, and will be an area of particular focus in my research. By way of example, one could imagine an Irish defendant being prosecuted in an Irish Court, with evidence being adduced by the European Prosecutor that was collected by the national authorities of some other Member State from the defendant's private residence in that other Member State. Potentially, even if the evidence had been gathered legally under the national laws of that country, it may not have been gathered in a manner consistent with the Irish rules (which, in the case of evidence gathered from a person's residence, stem from the Constitution). If that same evidence had been gathered from the defendant's home in Ireland, then the relevant Irish constitutional rules and jurisprudence would be applied to it before determining whether or not it was admissible at trial. Under Article 30(1) of the draft EPPO regulation, the evidence gathered in our example above would be deemed admissible "where the court considers that its admission would not adversely affect the fairness of the procedure or the rights of defence as enshrined in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union," and therefore any specifically Irish evidentiary requirements would not need to be met in relation to that particular piece of evidence. Thus a different, and possibly lower, level of scrutiny would be applied to evidence gathered in other Member States, which could lead to an adverse knock-on effect for an Irish defendant at trial.

The EPPO has the potential to constitute a leap forward in terms of a developing criminal justice sphere within the EU. It would be the first EU body with prosecutorial (as opposed to simply coordinating or facilitating) powers, and would allow the EU to directly defend its own financial interests. The proposal is not, however, without its detractors, and there still exists the very real possibility that some Member States' reservations, and a fear of creeping European federalism, could diminish the role of the EPPO to the point of redundancy. Some of the amendments put forward by Member States in the Council of the EU could be seen as chipping away at the very foundations of the Office before it is even established.

National reservations and 'yellow cards'

There exists in the EU's legislative process a little-known procedure known colloquially as the subsidiarity 'yellow card'. This procedure allows national parliaments to have a say on draft EU legislation, and to require a response from the Commission if they feel such legislation is in breach of the principle of subsidiarity, a principle set out in Article 5(3) of the Treaty on European Union in the following terms: "[T]he Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States [...]" . Each national parliament has two votes (one per chamber in a bicameral system, and two to the single chamber in any unicameral system), and a 'yellow card' is triggered in this particular area of EU law if chambers representing one quarter of the votes (14 out of 56) issue a reasoned opinion that the draft law breaches the principle of subsidiarity. In the case of the EPPO regulation, 14 chambers (representing 18 votes) issued such an opinion, forcing the Commission to issue a response, explaining how it would take these concerns into account. The reservations expressed by national parliaments ranged from fears of the EU encroaching on national sovereignty, to claims that the EPPO would provide no added-value, to assertions that 'our national prosecutors are doing just fine on their own thank-you-very-much'.

As the 'yellow card' threshold was met, the Commission was legally required to review the draft, before deciding whether to maintain, amend, or withdraw it, with reasons given for this decision. Rather expectedly, it decided to maintain the draft as it was. Rather disappointingly (well, depending on who you are, I suppose) it justified this decision in a mere 13 pages. To put that into some context, the reasoned opinion of the UK's House of Commons (just one chamber out of 14 issuing such opinions) stacks in at a hefty 62 pages.

Though every Member State is currently involved in the drafting and redrafting of the EPPO regulation, many have already expressed their intention not to take part in the Office. Ireland is one such state. The EPPO will thus initially be set up under the enhanced cooperation procedure, and will not have EU-wide jurisdiction, but those Member States that are less comfortable with the concept of an EPPO, and which will *not* be under its jurisdiction, still have the opportunity at this stage to weaken its structures. The fact that the draft law is currently undergoing extensive amendments in the Council of the EU is perhaps a reflection of, or indeed a reaction to, the Commission's rather cavalier response to genuine national concerns. This reaction, and the subsequent sweeping amendments to the proposal, risks the creation of a European Public Prosecutor who will be forced to live in a house built by the Member States on a foundation of sand.

My research

My research critically analyses the (evolving) text of the Council Regulation establishing the EPPO in order to evaluate its potential impact on the Irish criminal justice system, considering both the position of Ireland as a non-participating Member State (including its interaction with the Office as a third party), and its potential future involvement, with a view to providing a recommendation as to whether the State should accede to the Office. It questions whether the decision to initially remain outside the Office was justified in light of Ireland's common law traditions, and will seek to clarify Ireland's genuine reasoning behind not taking part in the EPPO. Irish engagement with the proposals thus far appears to have been cursory at best, the reasoned opinion of the Joint Committee on Justice, Defence and Equality, for example, consisting of a grand total of two pages, despite serving as the opinion for both the Dáil and the Seanad. It is hoped that this research might help inform a more nuanced and considered approach to the EPPO, and prompt a genuine debate on Ireland's potential accession following its establishment.

As the EPPO regulation proposes such a potential leap forward towards a proto-federal EU criminal justice system, the political concerns of the Member States cannot be ignored in a legal analysis of its provisions. Some of the key issues I aim to discuss include how investigations are to be conducted in Member States under the EPPO's authority, how its actions may be appealed via judicial review, and how national rules of evidence could be affected. This latter issue is one of the most likely to have a direct impact on the rights of citizens accused of crimes, since, as mentioned above, prosecutions undertaken by the European Public Prosecutor could potentially be held to less stringent evidential standards than those undertaken by the Director of Public Prosecutions.

Even before a finalised text is arrived at, it is important to analyse the differing positions between the Commission and the Council; the differences between an idealised potential and an eventual reality. The EPPO has the potential to usher in a genuine European criminal justice area. At the same time, it is at serious risk of having its foundations swept out from under it by the ebb and flow of the more wary Member States.

Brian O'Reilly is a first year PhD student in the Department of Law, under the supervision of Dr. Fiona Donson. His research is funded by the UCC Faculty of Law PhD Scholarship.