

How to Protect the Financial Interests of the European Union: Between European Public Prosecutor and *Corpus Juris**

유럽연합(EU)의 재정적 이익 보호 방안 :
유럽 검사와 *Corpus Juris*를 중심으로

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ABSTRACT

EU는 공동예산을 수단으로 공동농업정책(CAP) 및 지역정책 등을 통하여 27개 회원국의 많은 공공정책을 수행하기에 이 예산의 사기 방지는 지속적인 이슈였다. 이 논문은 EU 예산의 사기 방지를 위한 여러 가지 법적·제도적 조치를 비판적으로 점검한다. EU 정책 결정과정의 다층적 거버넌스(MLG)의 특징을 지니었고 법적 및 제도적인 구조가 분절화되어 있어 예산의 사기 방지가 쉽지 않다. 또 EU의 부패방지총국(OLAF)과 Eurojust(회원국 사법 및 검찰당국의 사법 협력 기구) 간의 긴밀한 협력 관계 구축에도 불구하고 두 기구는 서로를 경쟁자로 보고 있어 협력이 쉽지 않다. 이 논문은 이러한 구조적인 문제점을 극복하기 위하여 회원국 전체에 통용되는 반부패 원칙과 조항을 담은 단일 법인 *Corpus Juris*의 제정과 이를 바탕으로 모든 회원국에서 EU 예산 사기 용의자를 검거하여 기소하는 유럽연합 검찰(European Public Prosecutors' Office)을 장기적인 목표로 추진할 것을 제안한다.

Key words: 유럽연합 예산관리, EU 예산 사기, 유럽부패방지총국, 농업정책, 지역정책, 유럽연합 검찰

I. Introduction

The European Commission (hereafter referred to as the Commission), an executive arm of the European Union (EU), has purported to represent the European interests rather than those of the Member States. Yet early 1999, such

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claims proved groundless after the Committee of Independent Experts entrusted to investigate the instances of fraud and mismanagement inside the Commission found that widespread mismanagement and cases of suspected fraud did take place in the organization (1999: 80).¹⁾ The case highlighted the problems and difficulties associated with managing the EU budget.

The Commission is tasked with managing the budget revenue and expenditure. It disburses the EU money both to the member states through various common policies like the Common Agricultural Policy (CAP) and Regional Policy and to other institutions. But rather than the fraud or irregularities allegedly committed by the member governments, as was often the case, the Commission itself was found out to be culpable of such wrongdoing. Hence, the report provoked a huge furore in Europe and raised the issue of budget management and protecting the financial interests of the Union once again.

In addition to the problems inside the Commission, there has been a growing concern that the EU's response to the ever-sophisticating transnational fraud against its financial interests has not been sufficient (Warner, 2001; Quirke, 2009; White 1995). Single market in the 27 Member States has provided the highly organized and mobile crime rings with many opportunities to try to take away chunks of EU money, while the actions both at the European and national level have been slow and fragmented. Internal market in the Member States where goods, services and capital and labour as well move freely without any border also led to common market for fraudsters (Dona, 1998; 283).

As the most advanced form of international cooperation, the EU is in a hybrid nature. In some policy sectors such as monetary and trade policies, supranational organization exercises the powers, whereas in foreign and defense policies, the Union's role is still limited and largely intergovernmental (Helen and William Wallace, 2005; 13-18). In this respect, EU budget, which is essential to implement these policies, offers an interesting case study, as it is partly supranational and intergovernmental. It is furthermore so, as in the middle of austerity programmes throughout the Member States since sovereign debt crisis erupted in mid-2010, sound financial management has been given additional importance.

This paper critically examines the ways for protecting the financial interests of Union, that is, budget management and argues that it is better to combine Corpus

1) Paul Van Buitenen, a Commission official, was a whistleblower, who claimed that widespread fraud be in the Commission. The Committee's findings saw the entire resignation of the 20 Commissioners, the first-ever such a case.

Juris and European Public Prosecutor's proposal together to continue to safeguard itself against infringing the union's wallet.

This article is organized as follows. The second chapter puts the Union budget into a context, offering a glimpse into its size and decision-making. Then follows its management structure and difficulties associated with it. Chapter four gives a critical review of Corpus Juris and European Public Prosecutor's proposal. The fifth chapter summarizes and concludes the paper.

II. European Union Budget at a Glance: Size, Sources and Decision-making

EU budget in 2012 totalled €147.2 billion (commitment appropriations). It is about 1% of the total gross domestic product (GDP) of the 27 Member States of the EU. The Commission estimates that a citizen in the EU pays 67 cents on average a day to finance the annual budget (2012).

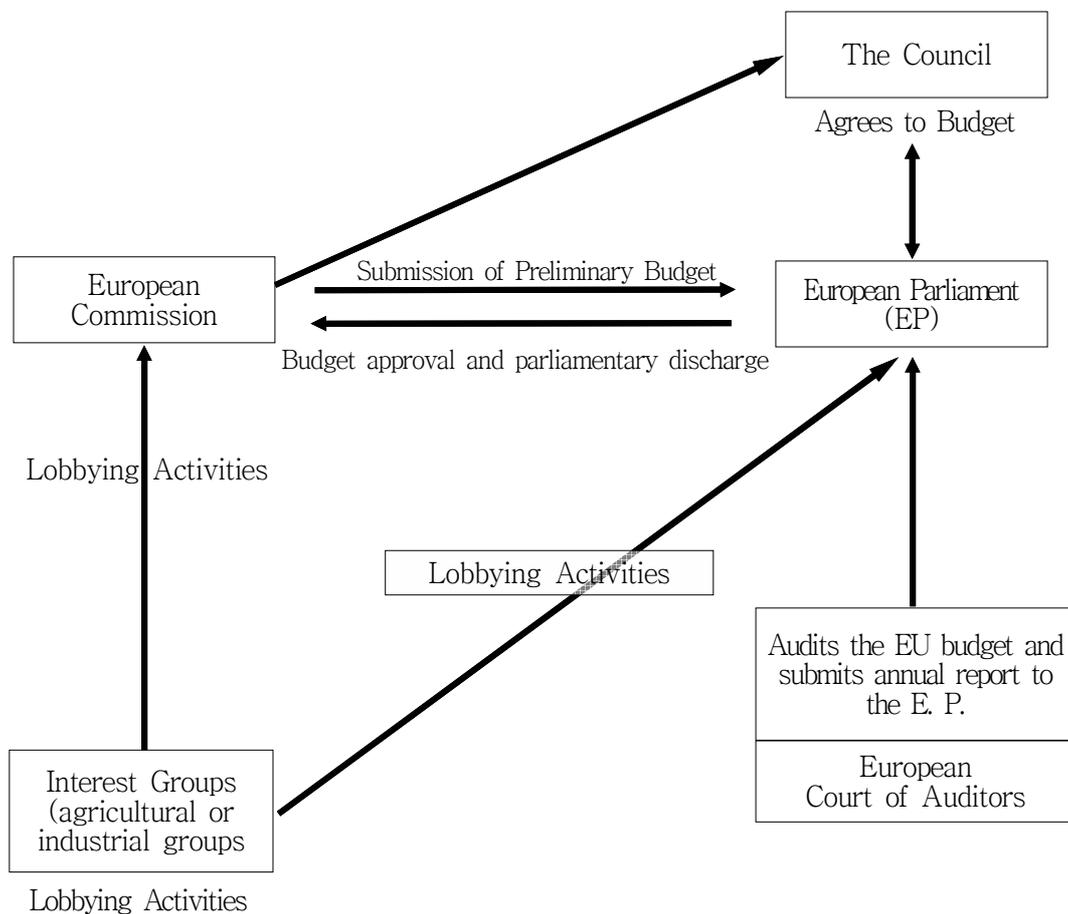
Broadly speaking, there are three main sources of the budget. 73% of the budget revenue comprise gross national income (GNI)-based contribution from the member governments, while 15% comes from customs duties imposed on imports from the third countries (traditional own resources) and 11% from value-added tax resources of the member states. The ratio of the contributions for which member states have to pay in accordance with their economic size has increased successively since its introduction in 1988 in proportion as 'own resources' (customs duties and Vat) declined over the years (AN, 2010).²⁾

Around 71% of the budget is mainly spent on the Common Agricultural Policy (CAP, about 41% of the total budget) and regional or cohesion policy (structural fund 30%). Aid to farmers in the EU has been criticized both at home and abroad for its overspending and distorting agricultural trade by imposing higher protective tariffs towards non-member states. Cohesion policy aims at reducing the gap of economic prosperity between regions in the Member States. The budget saw its gradual shift towards bigger portion of the cohesion policy, as continued enlargements in the 1970s, 1980s, and early 2000s took in poorer member states in the Mediterranean and central and eastern European states as well.³⁾

2) This component of the EU budget is called 'own resources,' as the resource accrues from the common policies of the Union (common commercial policy and common agricultural policy).

With CAP and cohesion policies constituting around 71% of the Union budget, it is principally in the two policies that fraud claims have been raised and investigated. For the traditional own resources that the countries in the EU collect and transfers to the EU, fraud has been, albeit in small scale, also detected. The Commission is ultimately responsible for managing the budget, yet these two policies need a closer cooperation from the Member States in implementing the community money. Member governments are disbursing the allocated money to the relevant organizations and agencies charged with agricultural and regional developments.

<Figure 1: Budgetary Decision-making in the European Union>



* source: Laffan, 1997; 21-23 and compiled by the author

3) For budgetary decision-making and historical overview of the main budgetary policies, see Brigid Laffan, *The Finances of the European Union* (London: Palgrave, 1997).

Budgetary decision-making is split between European Parliament (EP) and the Council of European Union (the Council). The Commission produces preliminary draft budget every spring to the budgetary authority, the EP and the Council and the two iron out the difference to reach an agreement. The EP usually approves the annual budget before the start of the financial year, 1 January of each year. European Court of Auditors audits the EU budget, including revenue and expenditure, and submits an annual report to the EP so that the parliament can have an informed judgment to discharge the budget. The following gives a brief sketch of the decision-making process related to the budget.

III. In the labyrinth of budget management: 10% fraud?

1. Size of Fraud

Although the Treaty of Lisbon requests the Member States to protect the financial interests of the Union just as they do theirs, the reality is quite different. Member governments are neither serious about investigating the fraud cases related with the EU budget nor recovering possible losses, as they regard the issue as a kind of zero-sum game (European Court of Auditors, 1978).⁴⁾ Apparently, EU countries would direct a watchful eye on the Union spending in their territory, because about 73% of the EU budget comes from national contribution.

The Commission also has been very reluctant to estimate the size of the budget fraud, citing for its technical difficulties. But it is more of its natural unwillingness to measure the irregularities scale, because it is sure to be continuously levelled at poor management. So, estimated size of the budget fraud varies from 10% to 0.2%

4) European Court of Auditors prefers using the term irregularity to fraud, although in its first report of 1978 it referred to fraud as "the deliberate misappropriation of money or goods, inevitably involving breaking the law or the irrelevant rules and instructions of the organization concerned." ECA, Annual Report 1978; Dick Ruimschotel, "The EC budget: Ten per cent fraud? A policy analysis approach," *Journal of Common Market Studies*, 32/3(1994), pp. 319-347, pp. 319-320. In the UK the House of Lord Select Committee on the European Union, one of the most critical and keen observer on the issue, went so far as to regard the fraud against the European Union as a 'public scandal.'

of total community spending (Ruimschotel, 1994; Paterson, 1997). Most recently, there were glimpses of a clue regarding the scale of the fraud. European Court of Auditors in its annual report of the budget implementation 2010 (2011) estimates the error rate of the EU budget in the region of 3.7% in the Commission's payments. Mistakes were made by the Commission without following the disbursement procedures strictly. In cohesion policy (structural fund), the rate was slightly over 5% (Financial Times, 22 Feb. 2012). Since the eastern enlargement which as many as ten central and eastern European countries (CEECs) joined the Union in 2004, errors in implementing the cohesion policy have jumped. Poland, the biggest country among the CEECs, got paid about 9.7% (€11.825 billion) of the total EU budget in 2010. Around 70% of the payments were made for the cohesion policy in the country (European Court of Auditors, 2011). Several CEECs encountered difficulties in administering the Union money, as they lack administrative capacity to do it.

On the other hand, the Commission in its defense (2012) argues that suspected fraud was estimated to constitute 0.2% of the EU budget. This statement is worth noting, as it is the first time that the Commission gives an official guess of its fraud scale.

By contrast, annual report on the fight against fraud (2010) finds that the financial impact of irregularities in expenditure rose to €1.8 billion in 2010 (about 1.27% of the total budget expenditure) and so did the increase in revenue.

2. 'who polices fraud' (Quirke, 2000)

Due to the multi-level governance structure of the EU,⁵⁾ budget management is shared between the Member States and the Commission and within different institutions. Also crimes against EU funds are on many occasions are transnational, but enforcement agencies operate according to their own procedures (European Court of Auditors, 1998). Therefore, there is a need for a European policing.

The Commission is ultimately responsible for implementing the budget. But around 76% of the budget has a shared management structure: both the Commission and the member governments share responsibility for administering the wallet, with individual EU countries actually spending funds and managing

5) For multi-level governance of the EU, see Lisebet Hooghe and Gary Marks, *Multi-level Governance and European Integration* (New York: Rowman and Littlefield, 2001).

expenditure. Unless the countries in the EU pay more attention to detecting and eliminating the fraud against the budget, preventing it would be no pushover.

To protect the financial interests, the EU set up the OLAF, European Anti-Fraud Office. It is the lead transnational investigation agency against the EU fraud.⁶⁾ It is operationally independent both from the Member States and the Commission and has its separate budget. Yet it is still a part of the Commission. Its director general is appointed by the consensus of the Council of the European Union and European Parliament. But the shortlist is drawn up by the Commission. Thereby the Commission has the power to influence the selection process either including or excluding candidates from the list.

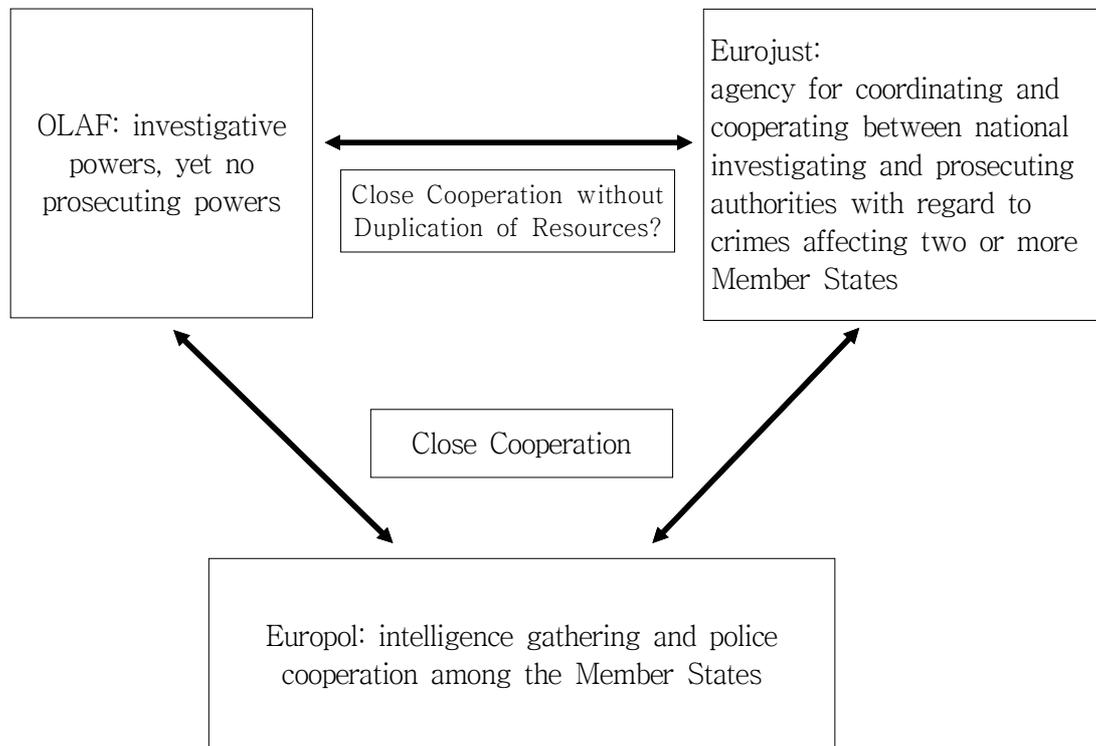
Established in 1999, it has around 500 staffs as of end of 2011. Even though it is the lead agency which has an European view on the fraud, it has encountered several difficulties. OLAF has administrative investigations of crimes affecting the financial interests of the EU without prosecuting ones and has to depend heavily on the relevant agencies in the Member States to carry out investigations. However, cooperation from the EU countries is not readily forthcoming. Also 'duplication of efforts and resources' could sometimes arise between the OLAF and investigative bodies in the Member States. Another complicating factor is its relationship with the Eurojust (Quirke, 2009: 535–538).

Eurojust, a judicial cooperation unit based in the Hague, Netherlands, is an agency for coordinating and cooperating between national investigating and prosecuting authorities with regard to serious organized crimes affecting two or more Member States. It is composed of prosecutors, magistrates and police officers seconded from each Member State (Jimeno-Bulnes, 2003). OLAF and Eurojust concluded Cooperation Agreement in 2008 and hold regular meetings and exchange information through a secure communication network. It often happens that OLAF transmits its investigated case to the Eurojust when it regards the case as needing judicial cooperation among two or more national authorities. The two institutions share the same aim of protecting the financial interests of the Union, albeit with a different nature of tasks. Yet some of the insiders at the agencies admit that OLAF deems Eurojust as its competitor rather than an ally (Quirke, 2009). If such a sentiment is widely shared among the two, cooperation would not

6) It was established in 1999, replacing the UCLAF, a division within the Commission. For OLAF's powers and limits, see Brendan Quirke, "Economic Crime and Legal Competence in the EU," *Crime, Law and Social Change*, 51/5(2009), pp.531–547. Also http://ec.europa.eu/anti_fraud/index_en.htm (accessed on 1st June 2012).

be easy. The following illustrates the relationship between the two.

<Figure 2: OLAF, Eurojust and Europol>



* source: compiled by the author

Besides the organizational turf-fighting, more perplexing with investigating and prosecuting the EU frauds is fragmentation in legal and organizational structure.

The EU doesn't have any single legal code or system to protect its budget and as many as 27 different legal structures exist. Several Member States regard EU fraud as a criminal offence, while others do not so (Ruimschotel, 1997). Successive enlargement of the Union further complicated the matter, as some of the new entrants such as Bulgaria and Roumania, which joined the EU in 2007, didn't have the capacity to deal with the fraud effectively (Quirke, 2010: 110-112).

In the turf-fighting between the OLAF and Eurojust, lack of ownership comes to the fore. Who plays the command and control role in investigating and prosecuting Euro fraud is fuzzy. As shown above, multiple actors are there and there is no central coordinating body to sort out the problem.

IV. European Public Prosecutor and Corpus Juris: two sides of a coin

To address the fragmentation and enhance the protection of EU funds, there have been two proposals to date. One is about establishing European Public Prosecutor's Office (EPP) and the other Corpus Juris, a single penal law for the EU. These two are closely interconnected, as the former is to be accompanied by the latter to work effectively. European prosecutors would be a non-starter without a uniform criminal law.

EPP is envisaged in the Lisbon Treaty. The treaty in article 69 of Chapter 4 states that, "in order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust". It is a long-term objective, yet it foresees that such an agency is necessary given the essentially trans-border nature of crimes encroaching on the finances of the EU. Over a decade of its operation, the Eurojust has accelerated cooperation between different national legal authorities and built up many refined procedures to facilitate such a cooperation among the Member States (Coninx and da Mota, 2008: 165). It also maintains cooperative networks with the third states such as the United States, Norway, and Switzerland to fulfill its objectives. But the EPP would take long to materialize and even though it might be set up eventually, it would not be sufficient without a uniform criminal code to cover offences against the EU funds.

So far, with regard to safeguarding the EU's financial interests, harmonization and assimilation of European and national laws have been made, by 'integrating Community norms into national norms and treating Community interests in the same way as national interests (Delmas-Marty, 1998). Despite these gradual changes, ever-increasing and sophisticating nature of cross-border financial crimes against the EU budget raised the need for a set of legal principles that would be valid across the Member States when dealing with crimes associated with the EU. This corpus juris saw its limited realization in the Protection of Financial Interests (PFI) adopted in July 1995 and related articles in the Lisbon Treaty. But the PFI is an intergovernmental convention in the third pillar, leaving the power to implement and prosecute entirely to the Member States.

Experts recommended the three principles deemed as essential to guide the

provisions as regards the corpus juris; legality of crimes and penalties; fault, basis of criminal liability; proportionality of penalties to the seriousness of the offence (Dona, 1997). Following articles lay down the definitions of terms such as fraud, corruption and other types of crimes against the EU money.

The EPP was originally contained as a part of criminal procedure in the experts' recommendations submitted to the European Commission and the EP in 1997. According to the experts opinion, it is an independent judicial authority based in Brussels to conduct investigations and prosecutions anywhere in the Member States of the EU against the Union's financial interests. For the envisaged EPP to work effectively, corpus juris is a must. Hence, the EPP and a union-wide criminal law are the two sides of a coin.

Although given reference in the Lisbon Treaty, EPP proposal encountered strong opposition from some countries in the EU, in particular the UK. The British government regarded such an idea as severely impinging on national sovereignty. Other countries, Germany and France were not enthusiastic about the it (Quirke, 2009: 532). So, european prosecutors chasing after fraud perpetrators across the Member States would be a long shot.

V. Conclusion

This paper made an attempt to critically examine the protection of the financial interests of the EU. It showed that the Member States have not been sincere about safeguarding the Union purse, despite continued rhetoric to the contrary. As a matter of fact, annual report on financial fraud (2010) pinpointed France, Germany, Spain and Britain as countries that reported very low suspected fraud rate. It doubted whether such a low rate is credible. Also fragmented structure, legal and organizational, further complicates the matter with OLAF and Eurojust sometimes bickering over their priority to the case. There are some policemen acting to protect the finances of the EU, yet their capacity is limited by the fragmentation.

Winds of austerity sweeping through the EU since the global crisis in 2008 have pushed the member governments to strengthen their common response to the fraud in the Union. Yet, EPP and corpus juris are long-term vision. But external factors could press the EU for forging towards such objectives. External pressure such as the 9/11 terrorist attacks in the US sped up the introduction of European

(common) arrest warrant (EAW). The warrant issued in one country in the EU is valid across the Union. It significantly accelerated the cooperation among the Member States in the 31 serious crimes, including terrorism, organized crime, money laundering and human trafficking (Deen-Racsmany, 2006).⁷⁾ A large organized crime ring might be involved in money laundering. In that case, both the OLAF and Eurojust might be called into the investigation. This putative example illustrates that continued cooperation and pressures, internal and external, might facilitate the gradual fleshing out of the EPP along with a union-wide criminal code.

Besides continued calls for reforming the EU budget still heavily skewed towards agricultural support, agreements among the Member States to boost competitiveness and some improvements thereof might help to reduce the fraud rate in the short-and medium-term. Such a diversion of the union wallet towards competitiveness is to increase the portion of centralized management of the budget by the Commission. Several reports to date argued for refocusing the budget more on R & D away from the CAP and cohesion policy to enhance the EU's competitive edge (Begg, 2005).⁸⁾

Last, but not least, it goes without saying that the EU, in particular, the Commission should continue to coopt the Member States to strengthen its supervision on the expenditure.

7) The number of EAWs issued increased more than four times from 3,000 in 2004 to 13,500 in 2008. http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_criminal_matters/133167_en.htm (accessed 2nd June 2012).

8) Sapir report in 2003 is a typical case. It recommended the Commission to reduce CAP ration from 40 % to 15% to focus on the economic growth and employment in the EU. For critical examination of EU budget reforms, see F. Heinemann, P. Mohl, & S. Osterloh, "Reforming the EU Budget: Reconciling Needs with Political-Economic Constraints," *Journal of European Integration*, 32/1 (1998), pp. 59-76.

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ABSTRACT

How to Protect the Financial Interests of the European Union: Between European Public Prosecutor and *Corpus Juris*

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Fraud of the European Union (EU) budget has been a perennial issue, as the budget with not insignificant amount of money fulfills some public policies such as the Common Agricultural Policy and Regional Policy across the 27 Member States of the EU. This paper makes a critical examination of the current fragmented structure, legal and organizational, to tackle the 'public scandal' and suggests that both a body of criminal law applicable uniformly across the Member States and European Public Prosecutor's Office should be achieved as a long-term objective. In the meantime, such short-and medium-term efforts to refocus the budget on competitiveness-enhancing measures should also be redoubled.

Key words: European Union (EU) budget management, Euro-fraud, OLAF (The European Fraud Prevention Office), Common Agricultural Policy, Structural Policy, Corpus Juris and European Public Prosecutor