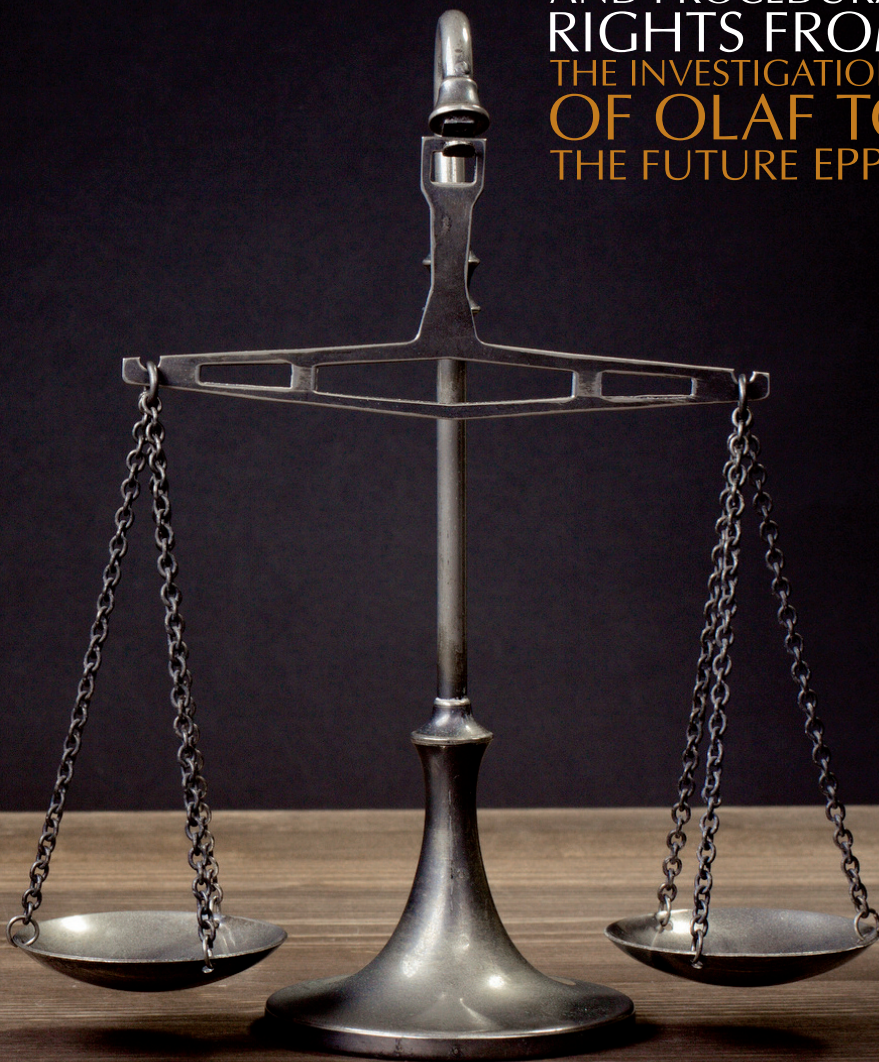


PROTECTING FUNDAMENTAL  
AND PROCEDURAL  
RIGHTS FROM  
THE INVESTIGATIONS  
OF OLAF TO  
THE FUTURE EPPO







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LELIO E LISLI BASSO ISSOCO



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OF OLAF TO  
THE FUTURE EPPO

Edited by Valentina Bazzocchi



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## Valentina Bazzocchi

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This book is a collection of papers presented at the International Conference “Protecting Fundamental and Procedural Rights from the Investigations of Olaf to the Future EPPO”, organized by the *Fondazione Lelio e Lisli-Basso Issoco* and held in Rome from June 12 to 14, 2013, thanks to the contribution of the OLAF-Hercule II program.

The aim of the meeting was raise awareness among legal professionals (judges, prosecutors and lawyers), students of law, representatives of European criminal law associations, ministry officials, MPs, police officers, and policy makers, of the issues involved in the establishment of a European Public Prosecutor’s Office (EPPO) and the kind of model it should be based on, in a debate involving experts in criminal law and criminal procedure from European and national high courts, EU institutions, the legal profession, the judiciary and academia, who have long been concerned with this issue.

The impetus for a discussion to address the issues involved in the establishment of a European Public Prosecutor’s Office came from the European Commission’s announcement that it would be presenting a regulation by the summer of 2013, giving effect to the provision contained in Article 86 of the Treaty on the Functioning of the European Union (TFEU). One of the innovative aspects of the Rome conference was the emphasis placed on the protection of fundamental rights, which must go hand in hand with the creation of a European Public Prosecutor’s Office. This issue links up with the roadmap set by the Council<sup>1</sup>, which is being implemented by the European Commission through the presentation of legislative proposals on procedural safeguards in criminal proceedings. Some of them have already been adopted<sup>2</sup>, others, as pointed out by the Vice-President of the European Commission, Viviane Reding, in the video message addressed to the Conference, will be included in the proposals which the Commission intends to present<sup>3</sup>.

The idea of criminal law protection of the Community’s financial interests is not new. A first draft amendment to the Treaty dating back to 1976<sup>4</sup> was followed by the Convention of July 6, 1995, and its additional protocols. At the same time, at

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1 Roadmap with a view to fostering protection of suspected and accused persons in criminal proceedings, 11457/09 DROIEN 53 COPEN 120

2 Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings; Directive 2012/13/EU on the right to information in criminal proceedings. As regards the proposal for a directive on access to legal advice from a lawyer in a criminal case, an agreement has been recently reached between the EU Council and the European Parliament.

3 These include the right to legal aid, and the presumption of innocence.

4 Draft Treaty amending the Treaties establishing the European Communities so as to permit the adoption of common rules on the protection under criminal law of the financial interests of the Communities and the prosecution of infringements of the provisions of those treaties, COM(76)418.

the initiative of the European Parliament and the Commission, a group of experts was tasked to develop some basic principles of criminal law protection of the financial interests of the European Union in the framework of a European judicial area. These were included in the *Corpus Juris*<sup>5</sup>, which provided for eight crimes, and their respective punishments, and the establishment of a new figure, the European Public Prosecutor, an authority that would be independent of both national authorities and Community institutions, responsible for investigation, indictment and prosecution throughout the territory of EU Member States. This very innovative idea would mark the transition from cooperation in criminal matters to integration. It is no coincidence that it was the Commission, supported by the European Parliament, that pursued this change of perspective, through the promotion of a study on the feasibility of the *Corpus Juris*, developed by a group of experts who analysed the impact that a European Public Prosecutor's Office could have on domestic criminal prosecution systems<sup>6</sup>.

At the Tampere summit, which represented a milestone in the creation of an area of Freedom, Security and Justice, setting political agendas and priorities for the 2000-2004 period, the Heads of State and Government avoided addressing the issue of establishing a European Public Prosecutor's Office, preferring to push for the establishment of Eurojust<sup>7</sup>. The European Commission did not admit defeat and in the Opinion of 26 January, 2000<sup>8</sup>, suggested including a legal basis in the treaty that would allow for establishment of a regulatory framework for offences and their respective penalties, the procedural requirements necessary for the prosecution of these offences and the provisions relating to the powers and duties of a European Public Prosecutor's Office that had the power, throughout the territory of the Union, to identify and prosecute cases of fraud before national courts.

During the Nice Intergovernmental Conference in December 2000, the Commission took up the subject again<sup>9</sup>, noting that although the 1995 Convention and its Protocols was a major breakthrough, it had not come into force, not having been ratified by all the contracting parties, and that even if it had been, there would still have been uncertainty about how the provisions would have been transposed by

5 *Corpus juris portant dispositions pénales pour la protection des intérêts financiers de l'Union européenne*, edited by M. Delmas-Marty, Economica, Paris, 1997.

6 *La mise en oeuvre du Corpus juris dans les États membres*, edited by M. Delmas-Marty / J.A.E. Vervaele, Intersentia, Utrecht, 2000. The *Corpus Juris* writers tried to lay the foundations for the creation of European criminal law and criminal procedural law, formulating eight criminal cases affecting the financial interests of the European Community. For further information on the *Corpus Juris*, cf. DELMAS MARTY, M., *Nécessité, légitimité et faisabilité du Corpus juris*, in *Agon*, 2000, no. 25, p. 5 and ff.; DELMAS MARTY, M., VERVAELE, J., *La mise en oeuvre du Corpus juris dans les États membres*, Antwerp, 2000; GRASSO, G., *Il Corpus juris: profili generali e prospettive di recepimento nel sistema delle fonti e delle competenze comunitarie*, in *Scritti in onore di A. Pavone La Rosa*, vol. II, Giuffrè, 1999, p. 1811 and ff.; GRASSO, G., *Il Corpus juris: profili generali e prospettive di recepimento nel sistema delle fonti e delle competenze comunitarie*, in PICOTTI, L., *Possibilità e limiti di un diritto penale dell'Unione europea*, Giuffrè, 1999, p. 127 and ff.

7 The idea of establishing a European Public Prosecutor's Office was revived in the debate that led to the Convention chaired by Giscard d'Estaing to draft a Treaty establishing a Constitution for Europe. Article III-274, provides that the Council may establish, by means of a European law adopted unanimously after obtaining the consent of the European Parliament, a European Public Prosecutor's Office from Eurojust to combat crimes affecting the financial interests of the Union. On this point, cf. below para. VII.

8 Opinion of 26 January 2000 "Adapting the institutions to enlargement", COM (2000) 34.

9 Communication from the Commission - Additional Commission contribution to the Intergovernmental Conference on institutional reforms. The criminal law protection of the Community's financial interests: a European Prosecutor (29 September 2000) (COM (2000) 0608 final).

the various parties. With as many different criminal justice systems as there were Member States, the Commission noted that, despite the effective administrative coordination provided by the European Anti-Fraud Office (OLAF, established by Decision 1999/352), prosecution remained uncertain, since there were no instruments to complement preventive action and administrative inquiries with prosecution by a criminal law authority. For this reason, the Commission recommended supplementing the provisions of primary law relating to the protection of the financial interests of the Community with a legal basis for the appointment of an independent European Public Prosecutor, with the task of prosecuting before the courts of Member States, and the adoption, in the Statute of the European Public Prosecutor's Office, of rules of substantive law concerning the protection of financial interests (offences and penalties), rules of criminal procedure and the admissibility of evidence, and rules concerning the judicial review of procedural measures taken by the Office in the exercise of its functions. In Nice, the position of the European Commission found no backing. The time was not yet ripe. It had to wait until the Convention chaired by Valéry Giscard d'Estaing, convened to draft the Treaty establishing a Constitution for Europe, to get an explicit legal basis in the Treaty. The wording contained in Article III-274, according to which the Council could establish, through a European law adopted unanimously after obtaining the consent of the European Parliament, a European Public Prosecutor's Office from Eurojust to combat crimes affecting the financial interests of the Union, was adopted in the current Article 86 TFEU, following the Lisbon reform, which entered into force on 1 December 2009.

The implementation of this article is a huge qualitative improvement on the current system, led by OLAF and its administrative investigations. But like all turning points, it raises questions. The solutions have problematic aspects as concerns the relations that the new European Public Prosecutor should have with the other parties involved, OLAF and Eurojust, given the apparently ambiguous wording "from Eurojust", contained in Article 86 paragraph 1 TFEU. An in-depth analysis is also needed of the composition of the European Public Prosecutor's Office, its functions (and in particular whether prosecution should be mandatory or not), the judicial review of its activities, the identification of the place in which to base the trial and relationships with domestic law systems.

All these issues were widely discussed and analysed during this International Conference, and the speeches have been collected in this book.

In particular, the **first session**, which introduces the topic, includes the contribution of Luigi Berlinguer, who points out that the establishment of a European Public Prosecutor's Office should be undertaken with courage to create a system of justice that is not fragmented, with a view to greater integration and the development of a common legal culture. This is followed by an analysis carried out by Jens Geier, which focuses on OLAF and the close link between this office and the European Parliament Committee on Budgetary Control, pointing out their respective functions. Hans Nilsson then illustrates the reasons for the establishment of the European Public Prosecutor's Office, focusing on the need to provide procedural guarantees, and on other issues to be discussed and resolved during the negotiations on the adoption of the regulation establishing the EPPO (place where prosecution takes place, review of the actions of the European Public Prosecutor's

Office, the relationship between Eurojust and the European Public Prosecutor's Office, structure and powers of the European Public Prosecutor's Office). Nilsson focuses on the decision to adopt a regulation, which takes precedence over the domestic law of Member States and is directly applicable.

The **second session** is dedicated to the protection of the financial interests of the European Union and fundamental rights in European and domestic case law. Yves Bot and Vladimiro Zagrebelsky examine the issue from the perspective of European case law, the Court of Justice and the European Court of Human Rights, respectively. More specifically, Yves Bot, in reference to some important recent judgments of the Court of Luxembourg (*Fransson*, *Melloni*, and *Radu* cases), focuses on the relationship between fundamental rights and the principle of mutual recognition as the main tool for developing the EU Area of Freedom, Security and Justice. In addressing the issue of European Public Prosecutor's Office, Bot highlights the move from cooperation to coordination but also stresses the need to respect the principle of legality. Zagrebelsky, instead, takes into account the requirements of due process, which the regulation establishing the European Public Prosecutor's Office will have to meet in order to be compatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). He also emphasizes the need to develop precise and clear criteria for determining the Member State before which criminal proceedings for the protection of EU financial interests should be instituted. Antonio Cluny and Ernesto Lupo, on the other hand, look at domestic case-law. Cluny notes that there is no Portuguese case law on the validity of investigations conducted by OLAF and their compliance with domestic legislation. He then looks at Portuguese law concerning offices that perform functions similar to OLAF, concluding that only an independent judicial authority, such as the prospective European Public Prosecutor's Office, could collect valid evidence accepted by national authorities. Lupo, in turn, focuses on the impact of the protection of fundamental rights on domestic protection of the rights of the suspect, referring to recent Italian case law to show how closely it now complies with Article 46 ECHR, and hopes that the European Union will work towards the adoption of a uniform set of procedural safeguards that are also applicable to cross-border investigations for the protection of EU financial interests. The analysis carried out by Ezio Perillo regards the theory of counter-limits. Recalling the recent Strasbourg Court ruling in the *Michaut* case, Perillo reflects on ECHR / EU relations and the principle of equivalence in the protection of fundamental rights. Moving on to issues involved in the establishment of a European Public Prosecutor's Office, he advocates the establishment of an *ad hoc* tribunal of freedom to review acts of investigation instituted by the European Public Prosecutor's Office. Alberto Perduca, instead, focuses on the role played by OLAF to underline its potential, on the one hand, though this is struggling to be fully realized, and the lack of a regulatory framework, on the other, something which European lawmakers seem to be keen to address by amending the original regulation. The risk, according to Perduca, is that the establishment of a European Public Prosecutor's Office, for which OLAF has prepared the ground, is born not out of the success of this body but its failure.

The **third session** of the book, dedicated to the future European Public Prosecutor's Office and its relations with OLAF, other European institutions and national

judicial authorities, includes contributions by Peter Csonka, Francesco Lo Voi, Andrea Venegoni, Fritz Zeder and John A.E. Vervaele. After explaining the reasons behind the European Commission's decision to submit a proposal for a regulation establishing a European Public Prosecutor's Office (financial and economic crisis, the creation of a European judicial area, increased integration), Csonka focuses on the distinctive features of the future Office (independence, exclusive competence in the protection of EU financial interests, structure, functions, guarantees, impact on national authorities and EU institutions). Lo Voi discusses the need for cooperation between Eurojust and the future European Public Prosecutor's Office, then going on to identify the points that require most attention (list of crimes within the jurisdiction of the EPPO, structure, rules of procedure). After reflecting on the current two-tier system for the protection of EU financial interests (administrative and criminal), Venegoni focuses on the possible scenario involving a division of roles between OLAF and EPPO. Zeder, in turn, refers to the discussions that preceded the actual inclusion in the Treaties of the legal basis for the establishment of the EPPO, and highlights the aspects that should be addressed, including the identification of the competent national court, indication of the court responsible for reviewing the decisions adopted by the EPPO, and rules of procedure. Vervaele, instead, focuses on the heterogeneity still present in the various national legal systems in the field of criminal procedure, and considers the kind of relations that could be established between EPPO, OLAF, Eurojust, and Europol, analysing the relevant provisions of the Treaty. Finally, De Matteis sees the EPPO as an absolute priority for the imminent Italian Presidency of the EU, and draws attention to the fact that the procedure for its establishment is curiously similar to that of the EU's accession to the ECHR, emphasizing its constituent nature. He stresses the need to find solutions that can give the EPPO the maximum efficiency and the highest degree of credibility. He identifies a number of aspects that need to be clarified: identification of clear predetermined rules on the distribution of powers, the referral of certain EPPO actions to the Court of Justice, mandatory/discretionary prosecution, the relationship between EPPO and its delegates, Eurojust and national authorities.

In the **fourth session**, the contributions dwell on the consequences of the establishment of a European Public Prosecutor's Office at national level and on the challenges facing Member States in adapting their national legislation to accommodate this Office. Two aspects are addressed: criminal law (e.g. definition of offences relating to the protection of the financial interests of the European Union) and criminal procedure (e.g. collection of evidence, validity of evidence, right to counsel, etc). Durdevic draws attention to the different ways in which legal concepts can be understood and the various investigative measures provided for in Member States, then moving on to identify two aspects that are particularly problematic and which need addressing in the negotiations establishing the EPPO, namely the admissibility of evidence and the submission of the decisions of the European Public Prosecutor's Office to judicial review. Farkas, in turn, mentions the main difficulties encountered in investigative procedures involving several Member States, most notably in the collection of evidence and its use. Sicurella reflects on substantive criminal law. In criticizing the vagueness of the provisions contained in Article 86 TFEU, she emphasizes the need to adopt a corpus of rules of

criminal law enforceable by the European Public Prosecutor's Office to ensure full effectiveness. She also identifies the weakness and ambitions of the proposal for a directive on the protection of financial interests (PIF). Parisi conducts an in-depth analysis of the principle of mutual recognition in judicial cooperation in criminal matters, highlighting its dual function: as a method for cooperation between national authorities and as a principle for the harmonization of guarantees for people involved in interstate proceedings. She believes that the European Public Prosecutor's Office should be fully integrated in the people-centric dimension that is taking shape in the European Area of Freedom, Security and Justice. Parisi also contends that EPPO activities will redress the heterogeneity of domestic rules concerning offences and related penalties, and will contribute to the strengthening of the right to an effective remedy.

Finally, the **fifth session** of the book is devoted to the consequences of the establishment of a European Public Prosecutor's Office in Italy in an attempt to make a concrete contribution to the preparations of the Italian Presidency of the UE (July to December 2014). In my speech I draw attention to some European institutional aspects that will characterize the period of Italian Presidency of the EU, and, after presenting the results of Stockholm in the field of criminal law, I focus on the opportunities Italy will have to set the priorities for the next five-year program (2015-2019). Then I look at the principles of the Italian Constitution to assess whether there are compatibility issues in relation to the future European Public Prosecutor's Office (rule of law, due process, presumption of innocence, mandatory prosecution). Comi expresses concern about the decision to establish a European Public Prosecutor's Office's as the most effective way of combatting community frauds. Nevertheless, he stresses the importance of involving bar associations in the difficult task of drafting the operational rules for the Office and indicates the minimum and inalienable guarantees to which suspects should have a right. Monetti, instead, supports the establishment of a European Public Prosecutor's Office and reiterates the essential points of Article 86 TFEU, providing indications about the concrete compatibility of the rules that will govern the Office with the Italian Constitution, in particular with the principle of equality and the right of defence. Monetti also stresses the importance of having rules on the admissibility of evidence and on conflicts of jurisdiction and looks at the possible role of the Court of Justice. As regards this aspect, Ruggeri believes that in the absence of an *ad hoc* legal basis, a European judge cannot be assigned the function of Judge of freedom. As regards the contribution of the Italian Presidency of the EU to the debate on the European Public Prosecutor's Office, Ruggeri believes that the priorities should include the judicial review of the actions of the European Public Prosecutor's Office, and the identification of a criterion for determining the competent court in cases of complex fraud.

The speeches given during the days of intense work at the International Conference in Rome, which have been collected in this book, have contributed to the debate on an issue of great importance for the development of the European judicial area, as the establishment of a European Public Prosecutor's Office is. A special thanks, then, to all those who, with their scientific speculations and in-depth analyses, have contributed to the success of the meeting and the publication of this book.

I session



Fundamental rights in  
the European area of  
justice: from the OLAF  
experience to the EPPO  
perspective





# Welcome address from the authorities

*Text sent by the Minister, read at the conference*

## **Anna Maria Cancellieri**

*Italian Minister of Justice*

I am particularly pleased to be speaking at this International Conference and for this, I am grateful to Elena Paciotti, who, as President of the Fondazione Basso, invited me to give a welcome speech to the participants - Italian and European legal experts and professionals – in this opening session.

The protection of fundamental rights is absolutely central to the future of the European integration process. In this context, the project to provide the Union with a European Public Prosecutor's Office stems from the need to ensure adequate criminal law protection for the European system, guaranteeing effective protection of its assets and evaluating how best to defend its financial interests, preventing and prosecuting fraud and other illegal activities.

The initiative to reflect on and discuss the creation of a European Public Prosecutor's Office is certainly commendable and, given the topical nature of the issue, extremely opportune. This institutional innovation, and the creation of the best conditions to ensure efficiency, is on the agenda of the Italian Presidency in the second half of 2014, which, within the context of a delicate debate on the legislative proposal, will play a fundamental role in providing the necessary impetus and make every effort to achieve consensus.

In fact, the debate on the "European Public Prosecutor" has been on the agenda of commentators and experts for a long time - I'd say at least since the 90s - and has, from the start, been a major objective for the creation of a European area of justice.

The entry into force of the Lisbon Treaty, in 2009, traced the outline, together with numerous and significant innovations, for more specific action, with direct references to both OLAF and Eurojust in Article 86 of the Treaty on the Functioning of the EU, which is the legal basis for the establishment of the EPPO.

The definition of the relations between the Prosecutor's Office and the institutions of the Union, and those between European authorities acting in the field of criminal justice, is certainly a complex issue. This, in this broader context, it will be necessary evaluate the results of OLAF and Eurojust activity, bearing in mind the roles that these two offices are called to play in Europe.

Over time, the European Anti-fraud Office (OLAF) has increased the efficiency of its investigative functions, and through its concrete actions on the ground, has achieved significant results. A similar process characterizes Eurojust, which has always striven, since its inception, to improve juridical co-operation and assistance among Member States in cross-border criminal investigations and prosecutions. Its duties, under the treaties, include supporting and strengthening coordination among national authorities responsible for investigation and prosecution.

The current fragmentation of European criminal law enforcement - which, according to many observers, is one of the causes of inefficient European action to combat organized crime – is, therefore, considered to be the key reason to provide the Union with a European Public Prosecutor's Office and accelerate in this way the harmonization of criminal law in Member States.

In the preliminary talks I had at the Justice Council last week, I was able to appreciate the great interest shown by many delegations and the Commission. As regards Italy, I can certainly guarantee that we have a clear awareness that the debate on the European Public Prosecutor's Office is a fundamental step forward in the creation of a genuine European area of justice.

However, even if there is consensus in principle on the goal of creating such an office, the Member States' positions diverge when it comes to examining concrete ways of implementing it and how it will actually work. I do not wish to enter into organizational details here about whether it should be collegial in structure or headed by a single judge, or about the extent to which it should liaise with the legal systems of Member States. I believe, though, that the negotiations in the Council and discussions with the European Parliament should consider some fundamental aspects.

Among them, for example, I would emphasize the importance of avoiding costly duplication and delays in judicial activities, ensuring the protection of the assets and rights that are of greatest importance to European citizens. In this context, the establishment of a European Public Prosecutor's Office should be accompanied by a careful cost-benefit analysis. OLAF and Eurojust should provide relevant information and data for the purposes of carrying out a proper impact assessment. Secondly, we must be face the implications of a European Public Prosecutor's Office "downstream", after the investigation phase, equipping judicial structures not only in terms of resources required but also the necessary European mindset and training for judges and other legal professionals.

However, my introduction to the conference would not be complete without highlighting the objective importance that the issue of the European Public Prosecutor's Office has for our idea of Europe as a litmus test for the commitment of this Government towards supranational and federal systems and models of economic and monetary policy, security and defence, as well as justice. It is a common conviction, which I also fully share, repeatedly expressed by President Letta and other government colleagues, each as regards their own sphere of competence. I believe that in the judiciary, too, there is a need for more Europe. In this sense, the establishment of a European Public Prosecutor's Office "from Eurojust", as it is stated in the Treaty, is a coherent evolution of the fight against fraud and the protection of the financial interests of the Union, which can already count on instruments of police and investigative coordination, and which needs to be completed on the justice front.

For these reasons, this conference is a valuable occasion for debate. I wish, therefore, to thank again everyone who has helped to bring about this initiative, and above all, the participants, among whom I can recognise many authoritative judges and experts. We are all aware of the importance of such a sensitive issue, especially in view of the Italian Presidency in 2014. I hope that we may meet again at a later date to assess what we have achieved, hoping that our expectations will not have been disappointed.

## Michele Vietti

Vice-president of the “Consiglio Superiore della Magistratura”

I would like to thank Elena Paciotti, President of *Fondazione Lelio e Lisli Basso*, for this invitation and the opportunity to participate in a debate of extraordinary importance and relevance, as is the one on OLAF and the establishment of the European Public Prosecutor’s Office.

Perhaps we have reached the moment of truth, when decades of projects accompanied by political and institutional activity, to which President Paciotti also referred, will finally come to fruition: the European Union will have an immediately operational central prosecuting judicial authority. This month, the European Commission will adopt a proposal for a regulation on the establishment of European fraud prosecutor, commonly known by the less than imaginative acronym EPPO (European Public Prosecutor’s Office). It has been a long road: at the time of the Maastricht Treaty criminal matters were not subject to direct Union intervention. The third pillar only involved criminal law cooperation, with the limited goal of promoting effective interaction among legal systems and the adoption of legislative measures aimed only at the harmonization of different systems, as was the case with the European arrest warrant. The Lisbon Treaty provided for the adoption of directives that were binding on national systems, containing minimum rules for determining crimes of a serious nature and a cross-border dimension. The substantive aspect followed on, as did integration from cooperation among legal systems.

The new regulations were accompanied by new operational instruments. OLAF, which has been operational for over a decade, is a European office whose members are guaranteed autonomy and independence from their States of origin, and, to a certain extent, also from European institutions. Yet OLAF deals merely with administrative investigations: it has no judicial competences or powers. Neither does Eurojust: it is a collegial office made up of members appointed by individual states that operate through horizontal cooperation and not vertical integration. And even though Eurojust could be assigned the function of initiating criminal investigations, under Article 85 of the Treaty on the Functioning of the European Union (TFEU), its main task is to support and strengthen coordination and cooperation between national authorities responsible for investigation and prosecution.

Finally, the European Public Prosecutor’s Office, which, under the aforementioned Article 86, will have the task of combating crimes affecting the Union’s financial interests. For this purpose, the prosecutor identifies, institutes legal proceedings, refers to judgment and prosecutes the perpetrators of crimes before a national court. Objectively, another turning point is the provision of what is

known as *enhanced cooperation*. A corpus of substantive law is beginning to take shape in Europe, within which the European Public Prosecutor will be operating. It is stated in the Treaty that the European Prosecutor is to be established *from Eurojust*, bringing to mind the above mentioned road we travelled towards cooperation. However, in this case it is a qualitative leap forward: it no longer involves just coordinating the investigations of others, or facilitating contacts between authorities of different systems, but assuming direct responsibility for investigating and prosecuting.

There are numerous problematic aspects, and I apologize in advance if, keeping within the remit of my speech (one of welcome and introduction), there are more questions than assertions in what I have to very briefly say. However, I think that in this phase we should ask questions, so they may direct our and your work, study and analysis.

What will be the role of the European Public Prosecutor's Office? Will it have direct relations with domestic judicial police? What requests will it make to national courts? What procedural law will be used? What competences will it have and what relations will it have with domestic inquiring magistrates? From the procedural point of view, a huge discussion point is the resolution of the asymmetry presently existing between the jurisdiction of the public prosecutor, which will be European-wide, and that of the judge, governed by the rules of each country. Will it perhaps be necessary to establish another supranational court to define the possible positive or negative conflicts over the identification of the competent national court to judge the proceedings initiated by the European Public Prosecutor's Office? Will European legislation derogate from a fundamental principle of our legal system, that of mandatory prosecution? The question of the legal system also poses problems of no small concern. Our system provides for a unitary judiciary inclusive of both prosecuting and judgement functions, which is independent and autonomous, has widespread powers and has no internal hierarchical structure. Elsewhere in Europe, we find legal systems with no professional judiciary, systems where prosecution is separate from judgment, and others where prosecution is under the direct or indirect control of the executive. Many systems have a hierarchical structure, where everything within a certain function is directed from the top. What structure will the European Prosecutor have? How will it be composed? Will it be hierarchical, headed by an all powerful director? One feasible solution is the so-called "double-hat", in which Italian delegated prosecutors may continue their functions as national prosecutors but when acting under the mandate of the European Public Prosecutor's Office, they will be fully independent of their national prosecution authorities.

Like all the other issues I have listed, this is a sensitive issue, of which European consultative bodies are fully aware. In fact, the Consultative Council of European Prosecutors issued a final document last May which reiterated the need to apply the principles and rules laid down in the Recommendation adopted by the Committee of Ministers of the Council of Europe, which examined a series of questions similar to those that I have mentioned. Europeans legal systems are quite diverse, even incompatible in some aspects, much more than is the case for judges.

However, I think it is possible to find something in common - and certainly

your work here will help bring it into focus. The public prosecutor could be given an essential judicial role, similar, at least in terms of independence from the executive, to a judge with full powers, in the wake of the conclusions of the Bordeaux Declaration issued jointly by the Consultative Council of European Judges and Consultative Council of European Prosecutors in 2009. In this context, a decisive role was played by the European Court of Human Rights, which in various rulings underlined the need for prosecution to be accompanied by guarantees. By way of example, we can refer to the judgements of Lesnik/Slovakia in 2003, Niedbala/Poland in 2000, and, more recently, the decisions in 2010 - 2011 referred to the French system and the extent of the public prosecutor's independence of the executive: a clear reference to the separation of powers and independence of prosecutors, which could provide a starting point for the development of a common European notion of public prosecutor.

A long stretch of road has certainly been travelled; we now have to walk the last mile, which is sometimes the most challenging. We must do it with a view to setting up an area where democracy is strong, mature and advanced, which legitimately aspires to become a model for the world. I believe we can be justifiably proud of our traditions and reasonably optimistic about the things that still separate us from the establishment of the European Public Prosecutor's Office.

## Welcome address from the authorities

### Guido Alpa

*President of the Italian "Scuola Superiore dell'Avvocatura"*

I would like to extend a greeting to the *Scuola Superiore dell'Avvocatura*, a foundation established a few years ago as part of the activities of the *Consiglio Nazionale Forense*, our national bar council.

Under the new reform of the legal profession, the *Consiglio* is responsible not only for organizing courses for trainee lawyers and in-service lawyers, who are obliged to acquire credits in the course of their activity (of which the study of fundamental rights and judicial cooperation are essential elements), but also for setting up a jurisdictional observatory, which will obviously take account of fundamental rights. I am honoured to have been invited to take part in this initiative, organised by OLAF and Fondazione Basso, as well as to be allowed extend a greetings to those who on behalf of Italy played a leading role in drafting the Nice Charter and then implementing it in the various national systems, including ours.

As regards the specific subject matter being discussed here today, I shall pass on the observations and proposals that are being discussed by a specific criminal law committee of the *Consiglio Nazionale Forense*. I am a lawyer in civil law and, thus, I would just like to highlight the three aspects being examined from this point of view by the *Consiglio Nazionale Forense* and the school, which concern fundamental rights in general.

The first is this: the Italian situation is particularly interesting and perhaps even a little curious. When it comes to fundamental rights, civil law, case law and doctrine all play a part. From the point of view of the civil law formant, today's initiative can be placed within the framework of the development and evolution of Community law, of the effects of Community law on domestic law and of the legislative initiatives of domestic law. From our point of view, the drafting of the Constitutional Charter in 1948, which has served as a model for written constitutions in Europe, was of great importance, but the case law formant is also essential. Namely the creation of fundamental rights by means of case law. A circumstance that might cause amazement is that it has been highlighted by our British colleagues, who come from a country where case law is so important, while for us it is exceptional. The right to privacy, of particular importance for us, is a creation of the Court of Cassation, which identified, in the 1960s, a new fundamental right by applying Article 2 of our Constitution. Another example comes from the 1980s, a right which in other jurisdictions is not particularly noted (though highlighted in the Charter of Fundamental Rights), namely the right to personal identity understood not as physical identity but the right to be represented in a way that fits with one's personal history. Then there is the doctrinal or academic formant, which is

particularly important in this field of fundamental rights and the rights of individuals. This is the first aspect.

The second aspect is effectiveness: it one thing for a right to be written into the Charter, another for it to be applied through case law, and another still in daily life. Unfortunately, in our country and in others where the effects of the economic crisis are particularly serious, fundamental rights are witnessing a regression. This means, as has been pointed out by many academics, that a fundamental right is not a lasting achievement but something that must be reaffirmed every day. Therefore, of great importance are the initiatives taken by *OLAF*, *Eurojust*, *Fondazione Basso*, and all those working together to implement forms of justice that make fundamental rights a reality. However, we must also take into account that the economic crisis will probably require further efforts since at this moment in time there are some worrying phenomena, such as the many instances of vulnerable groups being penalized, and the re-emergence of inequality and discrimination. Hence the concern of the legal profession for these phenomena.

# Welcome address from the authorities

## Raffaele Sabato

*Member of the Governing Council of the Scuola Superiore della Magistratura*

President Onida and the school's Governing Council attach great importance to the training of magistrates, especially as regards the issues which have been discussed at such high level in this international conference. Since it became operational, this school, which inherited the great tradition of professional training provided by the *Consiglio Superiore della Magistratura* (body responsible for ensuring the independence of the judiciary), has set much store on issues of European judicial cooperation, and had received specific directives in this regard from the Ministry of Justice and the *Consiglio Superiore della Magistratura*. The school has been running courses for trainee magistrates since October 15 2012 and, as of January 1 2013, has provided continuous professional development courses for in-service magistrates. In these few months, we have undertaken numerous initiatives on the themes you are now discussing at such high level.

It may be useful to mention, for example, that precisely today an important study meeting, entitled "European Area of Justice", is being held in our school in Villa Castel Pulci, Scandicci, attended by judges and public prosecutors from other European countries. A few weeks ago, a meeting was held on the Statute of the European Magistrate, with the participation of the some leading members of the judiciary, present today in this conference room, as well as members of the Council of Europe and its advisory bodies. Between March and April, courses were held for young trainee magistrates, focused not only on the theoretical study of the issues in question but also on the examination of concrete cases relating to fundamental rights often referred to our legal system, the drafting of orders for preliminary rulings before the court, and the compilation of European arrest warrants. The courses also included theoretical considerations and exercises on how these acts could have been interpreted by the Court of Justice, the authorities of countries receiving the arrest warrant, and so on.

In addition, the *Scuola Superiore della Magistratura* may, under Article two its founding decree, collaborate with both public and private institutions on specific programs. Therefore, on behalf of President Onida, it is with pleasure that we extend our appreciation to Fondazione Basso, as well as all the European institutions present here for this initiative and for future collaborations to which the school can contribute, if only to liaise with the many interested European and Italian magistrates.

In this regard, on the 27<sup>th</sup>, President Paciotti will be speaking to half of the new trainee magistrates who started their judicial practice a few days ago. They were received yesterday at the Quirinal Palace, and on the 27<sup>th</sup>, President Paciotti and Constitutional Judge Criscuolo will be giving them a talk on the history of the judiciary, a history that is above all one of fundamental rights and cooperation.



# Welcome address from the authorities

*Video-message*

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Protecting fundamental and procedural rights from the investigations of OLAF to the future EPPO

## **Viviane Reding**

*Vice-president and Commissioner responsible for Justice, Fundamental Rights and Citizenship,  
European Commission*

Ladies and gentlemen I want thank you for your very timely discussion on the design and challenges for EPPO. Today the European Union has no power to intervene in criminal cases affecting its funds. EU bodies cannot carry out criminal investigations prosecute, and bring to Court the offenders. Olaf carries out administrative investigations and may recommend a criminal follow up to the national authorities. Eurojust coordinates the law enforcement efforts of the member States but cannot bring a case before the Court. In short, the current system relies on an adequate national response. And this often requires overcoming barriers presented by institutional rigidity and diverging national legal considerations. There is a clear enforcement gap that must be filled by the European Prosecutor's Office. The future Prosecutor's Office will conduct investigations and prosecutions in a decentralized manner; yet with central steering and coordination. This will allow the Prosecutor's Office to integrate mostly international justice systems respecting their differences and traditions as well as rely on the expertise and resources. The European Prosecutor has exclusive competence to investigate EU Fraud. This will avoid conflicts of jurisdiction between member States as well as any duplication of effects.

The European Prosecutor should also address a fragmentation of prosecution efforts due to the national character of justice systems. The laws stop at borders, but crime does not. National prosecution services can only act within their national jurisdiction: this limits their ability to tackle cross-border crimes. This, in turn, hampers possibilities of investigation and prosecuting the sophisticated white-collar crime, often associated with crimes against the EU budget. For the European Prosecutor of the European Union it should be its single area for action. This should allow investigation and prosecution to cross member States' borders and to respond adequately to the challenges of crime affecting the Union's financial interest. Borders should no longer be barriers to pursuing criminals attacking the EU budget.

The European Prosecutor will also provide for better coherence throughout proceedings. It should demonstrate its added value by steering the process from the opening of the investigation until the trial, ensure continuity and foster a genuine European Prosecution culture throughout European Union. The Union and its member States have a duty: to address fraud and any other illegal activities affecting the financial interests of the Union. This is especially true in times of economic hardship and of limited and fiscally responsible Budget.

Despite this obligation to act, which is imposed by the treaties, the Union's fi-

financial interests remain insufficiently protected: fraud, corruption and other offences affecting the budget reach disturbing levels. As lawmakers, we cannot stand idle failing to take the most appropriate action. The Treaty of Lisbon gave us new and powerful tools that I meant to make a difference. We must now make use of them reinforcing the arsenal of measures to investigate and prosecute crime against the financial interests of the Union.

The European prosecutor will also strengthen the legal safeguards that protect individuals affected by investigations or prosecutions in the Union. I want the proposal establishing the European Prosecutor to include a serious of EU level procedural safeguards: this should include access to a lawyer, the right to be presumed innocent and the right to legal aid. The proposal should also stipulate that investigations are subject to judicial review. This will also make it clear that certain investigative measures require judicial authorization. In addition, it will provide for a comprehensive system of personal data protection. Taken together, these safeguards will provide a higher level of legal security in the Union's efforts to combat European fraud and enable a system of investigations and prosecutions based on the rule of law. These are the main elements of the future Commission proposal.

I count on your help to make this project possible very soon. I wish you every success with your discussions today and look forward to reading your contributions.

# The establishment of a European Public Prosecutor's Office: a step towards the creation of a non-fragmented justice system

*Check against delivery*

**Luigi Berlinguer**

*Vice-president of IURI Committee, European Parliament*

*The author believes that one of the causes of the situation of standstill in which Europe finds itself is the fragmentation of Member States' judicial systems. To address this issue, the establishment of a European Public Prosecutor's Office should be undertaken with courage as a tool for the creation of a system of justice that is not fragmented. The author emphasizes, however, that for this integration process to work, it is necessary to introduce a radical change in the mindset of legal practitioners to create a common legal culture. Finally, the author points out that in the production of European legislation we must always keep in mind the real effects that they produce, and monitor and evaluate their implementation at national level.*

I would like to thank the Basso Foundation and its President and for inviting me to speak at this prestigious conference. I believe that this is an important occasion to take stock of how the European Area of Freedom, Security and Justice has gradually taken shape, starting with the 2009 Stockholm Programme, which outlined the priorities for the European Union in this Area.

However, in addition to the European Public Prosecutor and the European Area of Freedom, Security and Justice, I think it is of paramount importance to consider the wider political and juridical issues. Our priority is, in fact, to create a basis for a truly common framework that takes into account the social and juridical needs which, in recent years, have gradually brought about greater convergence in the legislations of individual Member States, involving major reforms that are of great significance for the lives of citizens.

Let me list just a few examples: the protection of certain Fundamental Rights which have acquired more importance precisely in the European context; legislation on the law of succession and a Common European sales law; patents; sub-contracting; company and industrial law, labour laws; mediation and ADR/ODR; copyright; the European system of protection; property in marriage and divorce; review of Brussels I and so on.

We are, therefore, looking at a broad range of initiatives that are progressively contributing to the creation of a truly European Area of Justice.

However, today, in addition to Civil Law, it is important to address another aspect, just as significant but not easy to predict or imagine before the entry into

force of the Lisbon Treaty: the gradual establishment of a Common Criminal Law in this European Area of Freedom, Security and Justice.

The entry into force of the Lisbon Treaty plays a fundamental role, one that is extremely important in the process of the constitution and integration of the European Union. Lisbon has offered the legal basis for the development of regulatory policies to support the general trends of this society. In the past, judicial cooperation in criminal matters and cooperation between police forces were, in fact, governed by the third pillar of the European Union and, therefore, dependent on intergovernmental cooperation; European institutions, including the Parliament, had no competence in this matter and could not adopt regulations or directives. Most measures were framework decisions and one could not appeal to the European Court of Justice for judicial protection.

Another problem, perhaps the biggest which the European Union has had to tackle, is the serious financial and economic crisis facing us today; Europe is not growing and one of the causes of this standstill can be blamed on gaps in the judicial systems of individual states and the fragmentation this produces. This fragmentation constitutes a major obstacle to integration and the development of a social economy.

There can be no growth without full development of the internal market. It is in this area that we find all the measures adopted in the fields of commercial law and protection of workers' rights, thus taking into account the material conditions of the internal market and not just economic ones.

However, there is also no growth without Criminal Law that ensure effective justice in the fight against crime. And at a time like the one we are experiencing at present, this represents a new cultural statement, a new awareness.

It is in this framework that we can place the interesting results achieved by Eurojust and the prospect of establishing a European Public Prosecutor's Office, an idea that was greeted with initial scepticism. Finally, we are witnessing a revival of interest in, and a greater frequency of, concrete initiatives such as the planned Commission Communication "*Better protection of the Union's financial interests: Setting up the European Public Prosecutor's Office and reforming Eurojust*".

In fact, the Commission's initiatives in this area are gradually gaining in inciseness, partly because of a growing need to combat financial abuses.

I heard a few notes of optimism about the European Public Prosecutor; personally I believe it is a very complicated roadmap, which, however, we must pursue with determination. And yet, there is no doubt that, according to Eurobarometer findings, public opinion is in favour; the consciousness of European citizens and in particular Italian citizens, is animated by a great need for security, both individual and collective, both in business and industry.

It is an objective demand for the creation of a system of justice that is not fragmented. What is becoming increasingly clear is the need for solutions that can safeguard economic activity from various forms of crime in both individual Member States and at European level.

We should also emphasize that the differences between the various legal systems of the Member States, differences in terms of efficiency, duration of trials, the greater or lesser propensity to combat certain forms of crime, make it increasingly

necessary to adopt crime prevention measures that redress a situation characterized by great legal uncertainty.

This is also why the idea of establishing a European Public Prosecutor's Office tends to be seen in terms of the structure it is to have and its powers of direct investigation, as mentioned several times today.

I would like to add one consideration that may appear to be outside today's topic. Recently the European Parliament approved an initiative report on the need and usefulness of defining a law on the administrative procedure of the European Union.

In fact, it is no longer enough to look at judicial cooperation only in civil and criminal matters. We must also begin to address the rights that individuals acquire when they call on the Union for a series of administration activities, for which it is now directly responsible. Parliament has so far been alone in supporting the need for action in this area in spite of the fact that the Treaty of Lisbon contains a specific legal basis, Article 298 TFEU.

The Council and Commission have always been rather sceptical about the idea of a code of administrative procedure. Recently, though, the Commission intervened, politely but coldly, in response to our initiative report, confirming the generalized diffidence of the Directorates-General towards the definition of regulations for administrative procedure. The European Parliament, however, will continue to work in this direction.

From these few examples, there emerges a series of new needs which have a uniquely European dimension, which arise from the exponential growth of the cross-border dimension of the economic and social systems of Member States, as a natural effect of the increasing importance and greater integration of the European economy, as well as the need for growth and cohesion in the Union. In this light, then, the Stockholm Programme is not only an ideal aspiration but it is also an essential structured process for European reforms in the spheres of citizenship, international private law, civil, criminal and administrative cooperation.

And here there emerges another very topical issue to which I wish to draw your attention: the need to bear in mind the real and practical effects of new laws; no reform plan, not even the most ambitious, can ever produce long term results and have a firm hold on society unless its impact on society is not first evaluated, promoted and understood, especially as regards the number of citizens who will really benefit from the new laws. Today - I say this with a degree of self-criticism - we see the deficiencies of a European Parliament and national parliaments which are exclusively and unilaterally involved in enacting legislation, but also largely disinterested, in practice if not in words, in the effectiveness and implementation of the laws produced.

In the Union we have produced and built an imposing *corpus juris*, but the percentage of actual application of this legislation and thus the number of citizens that can actually take advantage of it seems to be less than 5%.

Not only do we have to make preventative impact assessments but we also need to monitor the actual effects, and to this end both Parliament and Commission should invest the resources they have at their disposal.

In this context, the Commission has just published the so-called *Justice Score-*

*board*, a tool that aims to help the Union and Member States to improve the efficiency of their legal systems by providing a set of objective, certain and easily comparable data on the operation of the justice system in various states. It is a very interesting idea on which more work, however, needs to be done.

Here there emerges a new priority to be developed in the Stockholm Programme review phase, when we shall be called to define the program's future multi-annual legislative framework. To do this, it is vital to introduce a profound change in the mindset of the legal professionals belonging to the various legal systems (judges, lawyers, notaries, public prosecutors etc.), which should be founded primarily on mutual trust.

On this issue, the European Parliament, in particular the Legal Affairs Committee, has adopted in this legislature a substantial change of approach, starting with a number of pilot projects and policy initiatives aimed at creating new evolutionary models for the dominant legal mindset and professional development. Stockholm and Lisbon have, in fact, marked a very important shift in the powers and policies of judicial training and cooperation in Europe, reinforcing the need to build a common European legal culture. Not a just common sentiment: magistrates have similar sentiments throughout Europe but their legal culture is often of different origins. The construction of a common legal culture is, therefore, the absolute condition for Europe, and for specific initiatives on Europe to make concrete progress. A European legal culture that complies primarily with the principle of subsidiarity and independence and supports mutual trust and mutual recognition. To ensure that national judicial authorities contribute fully to the achievement of this goal, they must first have a good knowledge of the Community's legal tools; a fair knowledge of foreign languages - the language issue may seem secondary but it is something that affects all the top professions in Europe - especially as regards technical terminology; and they can share a common mindset starting with the mutual knowledge and understanding of the systems deriving from the different legal traditions of *civil law* and *common law*. Thus, "judicial" training is an example of the new approach mentioned at the beginning of my speech. The underlying idea, which the European Parliament has tried to promote in recent years, is to advance a bottom-up approach in the construction of the professional development of judges, which includes member States, national associations of legal professions and universities.

In this context, an important role has been played, as a model for further action at Community level, by several experiences in a number of Member States - the most advanced being, in my opinion, the Dutch Eurinfra - which was a source of great inspiration in the definition of the pilot project that I presented on behalf of the Parliament's Legal Affairs Committee two years ago. The 2009 Stockholm Programme was intended to establish a series of objectives to be achieved by 2014. The European Commission then presented an action plan for the application of the Stockholm Programme on April 20, 2010. Now that the Stockholm Programme is past the half way stage, the Legal Affairs Committee, the Civil Liberties and Justice Committee and the Constitutional Affairs Committee of the European Parliament have undertaken an initiative to assess the progress made so far and the problems encountered, so as to identify the steps still to be taken, and possibly in-

cluded among the priorities for the next program.

Finally, I would draw your attention to the oral question that the three above-mentioned committees jointly presented last May to focus attention on the problem of the concrete application of European legislation. As I said, only a small part of the great quantity of laws produced at European level are actually transposed and applied. This certainly makes many of our efforts futile and, more importantly, does not enable citizens to fully enjoy the benefits of European citizenship: we build a Ferrari and move at a snail's pace. The problem of the effective application of legislation is of great practical importance and, therefore, fundamental. This is also true for national authorities and representatives of the legal professions present here today and will be even more so with the establishment of the European Public Prosecutor. Our request is to be provided with all the data currently available to the institutions, starting with the Commission, so that we can have a complete and concrete picture of the Area of Freedom, Security and Justice.

# The responsibilities of the European Parliament Committee on Budgetary Control and its relationship with OLAF in view of the establishment of the European Public Prosecutor's Office

*Check against delivery*

## **Jens Geier**

*Member of CONT Committee, European Parliament*

*The author emphasizes the close link between OLAF and the European Parliament Committee on Budgetary Control and their respective functions. Before declaring his support for the establishment of the European Public Prosecutor (EPPO), the author draws attention to the new OLAF Regulation and the important role played by the OLAF Supervisory Committee.*

I am honoured to be able to speak to you here today at this important conference. I would like to thank the speakers for their valuable contributions and I am very grateful to Ms Elena Paciotti and the Fondazione Basso for organising this conference and welcoming us here in Rome.

I am happy to give you my perspective - both as coordinator in the Budgetary Control Committee in the European Parliament - and as a politician who studied history who has already seen the protection of fundamental rights in Europe evolve hugely towards developments such as inclusion of legitimate individual rights in the 1999 Regulation on investigations carried out by the EU's anti-fraud office OLAF, and most significantly - of course - entry into force in the Lisbon Treaty of the EU Charter of Fundamental Rights. However, it is clear that many more challenges lie ahead, and one of the most important will be the establishment of the European Public Prosecutor's Office (EPPO). And all of this needs to be done in the context of a wide variety of judicial traditions to be found in different parts of the EU.

So firstly, my Committee and its responsibilities.

Since I have been on the Budgetary Committee in 2009, it has dealt with many issues linked to control of EU budget implementation and the fight against fraud. In this respect our core business is the protection of the EU's financial interests. And that means the protection of financial interests of all taxpayers within the EU. This central principle will guide me through my speech today.

To do this work, the Budgetary Control Committee - and the Parliament as a whole - have to work closely with the European Court of Auditors. Its suggestions



are a key element of sound financial management in the European Union. Furthermore, the Committee must also maintain close contact with OLAF.

Coming back briefly to the relation between the Budgetary Control Committee and OLAF, when the office was established in 1999 it replaced the previous anti-fraud unit within the Commission. The creation of a separate entity was a big step forward, as the Director General now had the power to open internal investigations and checks in the Member States on his own initiative.

As you know the office's mission is threefold:

- protecting the EU's financial interests
- detecting and investigating wrongdoings by members and staff of the EU institutions and
- supporting anti-fraud legislation and policies.

In its work, OLAF needs a strong, clear legal framework to ensure its investigations are effective and efficient and - most important - independent. For this reason, my Committee repeatedly asked for OLAF's investigative capacities to be strengthened. The latest developments can be seen in OLAF's 2012 annual report. By shortening the average duration of cases by several months and increasing the number of cases being processed at the same time, the office shows its strong commitment to fighting corruption and fraud in Europe. All of us, as Europe's citizens, have an interest in a strong and independent anti-fraud office, able to focus on its core business. Therefore, the link between OLAF and my Committee should be strengthened on all levels.

Now, I would like to turn in more detail to the Protection of the EU's Financial Interests - in Brussels we use the acronym "PIF" from the French "protection des intérêts financiers". The annual PIF report pre-dates other types of scrutiny of the budget and has to be carried out under Article 325 of the Treaty, requiring the Commission in co-operation with Member States to submit a report to Council and Parliament on measures to combat fraud.

So, we see that protection of the EU's financial interests and the fight against fraud encompass the core business of both OLAF and my committee. We produce the annual Parliamentary report on PIF, showing the latest developments, deficiencies and potential in this field, and in it we aim to show to what extent EU funds or revenues are at risk of mismanagement and misuse. This refers to both irregularities as well as instances of fraud.

I must emphasize that irregularities do not necessarily mean fraud. Irregularities are acts which do not comply with EU rules and which might have a negative impact on the financial interests of the EU. In day-to-day work in my constituency in Germany I often come across cases where small mistakes in implementation and execution of EU funds can add up to a significant overall error rate. Often the irregularities were due to lack of training or care rather than fraudulent behaviour, and so may be the result of genuine errors on the part of beneficiaries claiming funds of the authorities responsible for making payments. Only if errors are made with intent, it is fraud!

It is important to see how the picture develops when it comes to irregularities and fraud in the EU. As I just mentioned, the so-called PIF report gives a comprehensive overview of the development in this field in recent years. The main focus

of this year's PIF report is the Union's major spending areas such as Cohesion policy and agriculture and it also examines the revenue side. And here we come to one of the very serious concerns that I have been highlighting for quite some time. When it comes to the Union's own resources, the EU needs to get onto a better and more stable footing. Issues like cigarette smuggling, customs fraud or VAT fraud - including Missing Trader Intra-Community (MTIC) fraud (better known as Carroussel fraud or *Karussellgeschäfte*) pose a real risk to the EU's financial foundations.

I was rapporteur for the 2011 Commission discharge report, voted in plenary two months ago. The report calls on the Commission to collect reliable data on the customs and VAT gaps in Member States and to report regularly to Parliament. We insist also that tax evasion and avoidance schemes are identified and appropriate counter measures put in place. Furthermore, VAT and customs duty collection must be made more effective and efficient in Member States. These examples show the strong interrelation between Member States and the EU when it comes to the protection of financial interests. You can basically say: If national programmes and measures don't work properly, it affects not just the Member States' budget but also the resources available to the entire EU. So, fighting cigarette smuggling, VAT or customs fraud must indeed to be addressed at a European level.

OLAF in particular plays a crucial role here. EU financed programmes such as HERCULE promote activities to protect financial interests. For the period 2007 - 2013 the HERCULE II programme provides funding of almost 100 million EUR for action to combat fraud including cigarette smuggling and counterfeiting. National or regional administrations, research and education facilities as well as non-profit bodies can receive the funding. However, community-financed programmes like this are designed to complement and not to replace national efforts and - I would add - to help address weaknesses in national programmes designed to fight fraud, trafficking, smuggling and counterfeiting. Member States, nevertheless, hold primary responsibility and the obligation to allocate sufficient resources, skills and staff to implement appropriate measures on the ground. EU programmes like HERCULE can only contribute with technical support, training, or seminars and conferences such as this one. The Commission has launched more initiatives such as its Anti-Fraud Strategy including an Action Plan to fight smuggling along the EU's Eastern border. But as I said, these are simply measures to complement national efforts and not replace them.

OLAF is an indispensable player in the Union's goal work to tackle the problems I have just mentioned. Here, I would emphasise that OLAF's independence is of utmost importance to me and the Committee. As our main weapon in the fight against fraud, OLAF's independence is the foundation to effective investigations. My Committee's role is not to control the anti-fraud office but to guarantee its best functioning and optimise it where necessary.

Speaking of OLAF's responsibilities I would like to give you a brief overview of the Reform of the OLAF regulation and the OLAF Supervisory Committee

The current text of the new OLAF regulation is the result of more than six years of discussions between the Parliament, Council and Commission - with a Trilogue which took around a year to conclude - so you see how much work and time has

gone into the reform.

Most importantly, especially in view of current discussions about protection of *fundamental rights*, the new regulation text covers the issue of human rights and fundamental freedoms more extensively than the one currently in force. The new text imposes more detailed and specific obligations on OLAF and its Director-General compared with the current statement that investigations must be conducted with full respect for human rights and fundamental freedoms. This is a clear step forward.

The same is true for the provisions dealing with *OLAF investigations*. Whereas the current regulation gives only a broad overview on the opening of investigations in Article 5 for instance, the new one complements this with a range of improvements and innovations. Furthermore, Article 10 mentions that Member States need to (*I quote*) “inform the Office in due time, on their own initiative or on request by the Office, of the action taken on the basis of the information transmitted to them under this Article.” This basically allows for a much better follow-up of OLAF investigations in the Member States and increases transparency. And these are only a few examples of the improvements that can be achieved with the OLAF reform.

I am sure no-one will deny the improvements hard won in the lengthy Trilogue negotiations. Even though it is a separate issue, let me briefly refer in this context to what is called “Dalligate” in the media. The rapporteur for the OLAF dossier has threatened to open the entire package of the negotiated OLAF text because of “Dalligate”, with the aim of strengthening the OLAF Supervisory Committee, and limiting the powers of the OLAF Director-General. However, both the Council and the Commission have repeated that amending the regulation now is not an option. This was repeated in one of our recent committee meetings. The Commission has even signed a declaration in response to my initiative calling for an early evaluation of the new regulation. This has two advantages. On the one hand we keep the improvements gained and agreed by all parties in Trilogue negotiations, and on the other we will have the opportunity to amend or optimise provisions taking into account conclusions from recent cases when they are available, without jeopardising what we have already achieved. To my mind, anything else is neither in the interest of the committee nor of OLAF or the EU’s capacity to fight fraud. However, this position is contested in the committee and will be decided in the next plenary session of the European Parliament in July.

Speaking of the OLAF regulation means also considering the role of the *OLAF Supervisory Committee*. I declared several times in committee and in public that it is essential to have proper and effective supervision of OLAF. While OLAF is our most important weapon to fight fraud and other crimes against the EU’s financial interests, the Supervisory Committee is the Parliament’s guarantee that OLAF works within the boundaries of law and fundamental rights. OLAF and its Supervisory Committee must find a *modus operandi*. Their working relationship needs to enable efficient and effective work to be carried out they must reach mutual agreement on their procedures. The new regulation strengthens the oversight powers and enhances the Supervisory Committee’s competences. For instance it specifically includes the provision that the Committee shall participate in the annual exchange of views between OLAF and EU institutions. This contributes significantly to more

transparency and a better understanding of processes, which is essential for the Supervisory Committee's work.

Now - looking ahead from OLAF to EPPO.

The Budgetary Control Committee focuses on the Commission's proposal on the "Fight against fraud to the Union's financial interests by means of criminal law". This dossier is a shared responsibility between the Budgetary Control Committee and the Committee on Civil Liberties, Justice and Home Affairs (LIBE). The two committees will draw up a single report and will vote on it together at a later stage. An opinion will be given by the Legal Affairs Committee (JURI). Two joint committee meetings have already taken place between CONT and LIBE, mainly discussing the legal base of the dossier. Unlike the Legal Affairs Committee the Budgetary Control Committee supports the Commission in its initial plan to use Article 325 of the Treaty as a legal base. The main reason for this is that Article 325 is the one under which the current PIF work is carried out. Furthermore, it is subject to the ordinary legislative procedure, allowing for an effective and equivalent protection in the Member States and in all the EU's institutions and bodies. However, the Council showed disagreement with this interpretation. As a consequence, it indicated Article 83(2) TFEU as the appropriate legal base to allow approximation of national criminal law through minimum rules with regard to definition of criminal offences and sanctions to ensure effective implementation of a Union policy. Using this article instead of Article 325 means that three countries - Denmark, Ireland and the UK - can opt-out, which, I am convinced, weakens the entire dossier. Being the committee under whose responsibility the decision of the legal base of a dossier falls, JURI decided, however, to follow the Council's approach rather than that of the Commission.

This report on the "Fight against fraud against the Union's financial interests by means of criminal law" can be considered a starting point for possible establishment of a European public prosecutor's office, EPPO. It would be the first European office of this kind. It was only yesterday that the European Parliament voted in Strasbourg on the mid-term report written by the "Special committee on organised crime, corruption and money laundering" (CRIM). This report clearly calls for the European Public Prosecutor's Office to be established as provided for in Article 86 of the Treaty. It moreover recommends that (*I quote*) "the future office should have an efficient and streamlined structure and should be given the task of coordinating and encouraging national authorities so as to make investigations more coherent through uniform procedural rules". The Commission should present a proposal before September 2013 clearly defining not only the structure of the EPPO, but also its accountability to the European Parliament and, in particular, its interaction with Europol, Eurojust, OLAF and the Fundamental Rights Agency. As you can see the European Parliament is keen to see the Commission's proposal published.

## FINAL REMARKS

I am certainly not going to try and predict the future in terms of the European Public Prosecutor and the relationship with OLAF or other bodies. However, looking back we can see what we have achieved already with the Budgetary Control

Committee. I am convinced that we need a strong set-up for the European Public Prosecutors Office. As history has shown, it will not be easy to find common ground between the two legislators. However, it is not impossible. And it is now that we have to lay the foundation for this!

# European Public Prosecutor's Office: reasons for it and issues that need to be addressed

*Check against delivery. Opinions expressed on personal basis*

## **Hans G Nilsson**

*Head of Division Fundamental Rights and Criminal Justice, Council of the European Union*

*Starting with the statistics contained in OLAF's 2011 Report, the author sets out the reasons for the establishment of a European Public Prosecutor's Office (EPPO). After underlining the importance of procedural safeguards, he focuses on the main issues to be discussed during the negotiations on the Regulation establishing the EPPO.*

It's a pleasure to be here in Italy again. I would like to pay tribute to an Italian person who has been extremely decisive for the project on the setting up of the European Public Prosecutor's Office and that is my friend Francesco De Angelis who used to be a Director in the European Commission. He was working on budget control issues. Francesco was the one who set up a group of academics and asked them to try to do something against the fact that the prosecutions of the offences against financial interest of the Community at that time were not carried out properly in the Member States.

These academics made a project for him, but Francesco was not happy with that project. He said: "I don't want to have anything which is based on old judicial cooperation methods in the Member States. I need something more that has power; I need something that can actually work because the Member States work so differently: they are slow, they are inefficient and they don't understand the protection of the financial interests of the Union. They don't understand all the procedures that are in the European Community".

So Francesco set up, among other things, an Association for the criminal law protection of financial interests of the Union, basically in all the Member States of the Union; and we had I don't know how many hundreds of seminars over time. I have been travelling a lot in the European Union thanks to Francesco!

Why would we wish to have the European Public Prosecutor's Office? Isn't it enough to have the regular work of the national judicial authorities? Isn't it enough to have Eurojust? I have to admit that I have been skeptical for quite some time on the idea of setting up the European Public Prosecutor's Office because I had thought that we could probably deal with most of these cases at national level and perhaps through Eurojust. But I have also to admit that I have changed my mind a couple of years ago when I started to see statistics on how OLAF cases were dealt with by national authorities. I can give you some statistics from the OLAF Report 2011 where OLAF has analyzed more than 1000 cases that they

have handed over to national judicial authorities. An analysis of these judicial actions taken by the member States following OLAF investigations in the period 2006-2011 indicates that the number of cases in which no judicial decision has yet been taken is relatively high: 54% of all the cases that OLAF handed over to national judicial authorities in a period of 5 years did not result in any decision taken. In that report (I'm quoting, it's on page 21 of the Report) "more than half of the 471 actions considered by the judicial authorities were dismissed before trial, 42% of the actions resulted in a conviction and 7% resulted in acquittals. There was a significant variation in the results of the judicial actions between the member States" they note. If one reads the detailed statistics from that report (page 22), one can see, for instance, that as regards Italy there were 112 cases that were handed over to the Italian judicial authorities in the period of 2006- 2011; and of all those 112 cases, 75 of them were still pending so one did not know whether the case was dismissed, whether there was convictions or whether there were still prosecutions taking place. And, in fact, of those cases 21 were dismissed before going to any trial; and that is the Italian statistics and it is more or less the same for a number of member States. But one can see a variety of different handling of these cases: from 19% of cases that follow up on a prosecution up to 90% or even 100% for some member States where there were prosecutions carried out.

This is the reason why I have changed my mind; because I think that if the statistics were to be 30% across the board in all Member States, then probably there would be something wrong with OLAF's investigations and handing over of the cases. But now since they are from 19% up to 100%, I don't think that there is something wrong with OLAF's investigations; I think that there is something wrong in the Member States. And that is the reason why we would need a European Public Prosecutor: because that European Public Prosecutor would be able at least to contribute to greater coherence. There are, of course, differences in the results also in the Member States with different lengths of judicial proceedings and so on. We cannot do that much to that at the European Union level, but at least we can bring some more coherence in relation to this file. So this is one of the reasons, and there is a lot of more statistics as well if one reads the OLAF report, why I have actually changed my mind.

Now as some of you in the audience know, I have been participating in a number of conferences on the EPPO recently (I think that this is the fifth one that I have in the recent 3 months), but I must say that this particular conference is interesting because it deals with fundamental rights; and that I think is a very interesting aspect of the whole EPPO project. I know that there are some persons that say that fundamental rights and EPPO its not a problem because they say that everything will be done under national law; and we are all parties to the European Convention on Human Rights; we have the Charter of Fundamental Rights (which is part of the Treaties) so there is no problem.

I do not think that is correct; and as we heard just a moment ago by Vice-President Reding in the video message, the Commission will also apparently propose some rules in relation to procedural safeguards. So that will be very interesting to see. My experience is, of course, that to harmonize criminal mate-

rial law is relatively easy because then you can just simply say that this or that conduct is punishable. Whereas if you want to organize the criminal procedure law, that is much more difficult because our legal systems are so different. But there is one thing that makes me believe that after all it may be a little bit more easy this time; because what we will do (and we have to do it because the Treaty says that we have to do it) is that we will have a Regulation: we will not have a Directive. We will have a Regulation that will be directly applicable as if it were our own national law. It will become the law of Italy; it will become the law of any other participating Member State of the European Union. So this particular Regulation will be integrated into the national legal system; it will have primacy even over constitutional law (that is the clear case law from the European Court of Justice). In relation to that, I know that for criminal law lawyers this is very inconvenient to say because criminal law is extremely territorial and extremely jealous to safeguard its national law. But this is a fact of European law: this Regulation will become part of the national legal system. So I think that perhaps if we start to think in those terms, it will be easier and more palatable to try to understand that we may need to have some procedural safeguards. Mrs. Reding mentioned three of them. I don't know exactly what the Commission will propose: I hope that they will come up with their proposal on 2 July (this is the date that I heard a couple of days ago so let us see if they will be able to do that).

If one looks at the draft EU model rules of criminal procedure that was adopted by a group of academics and practitioners that had a discussion on these topics in a project under the leadership of Professor Ligeti in Luxemburg, then one can see that there is one of the rules which deals with the rights of the suspect; and I think that to some extent they correspond also to the OLAF Regulation which of course deals with administrative investigations; and Mr. Geier already mentioned some of them. Just to recall the rights that were dealt with in that project: the right to a legal assistance; the privilege against self incrimination (which is also the right to remain silent); the right to be informed by the EPPO that any statement the suspect made during the questioning may be used as evidence against him; the right to an interpreter and to translations; the right to gather evidence and to collect the evidence on behalf of the suspect; the right to access of materials; the right to be given a letter setting out the rights; the right to be promptly informed by the EPPO that he is suspected of a criminal offence. So those are the rights that are mentioned there. I don't know whether the Commission will propose all of them, but apparently from what we just heard some of them.

So we will see what will be the reaction of the Member States to this proposal; because it will probably be the first time that we will use a Regulation to try to harmonize a procedural law: we have done that, as some of you may know, through the so-called Roadmap of accused and suspects in criminal proceedings. We have adopted Measure A and Measure B on translation and interpretation on the suspect's rights and we have very recently (just two weeks ago) reached an agreement with the European Parliament on the access to lawyer as well. So there we have made some good progress. But all of these instruments were adopted in the form of Directives and not Regulations.



Is it enough to rely on national law? Well, I don't think it is that; because in any case even if we will have no procedural safeguards (I hope that we will have, I think that we should have it: it makes the project more credible), there are certain other aspects relating to fundamental rights which are definitely necessary. For instance, data protection. EPPO will need to handle personal data also at central level not only at national level. And there is no doubt in my mind that EPPO will have to have some kind of case management system. We are talking about perhaps 2000- 3000 cases if we are talking about the more serious ones; if EPPO will have an exclusive competence, also to deal with small cases- I think that probably might not happen, but if it does - he will probably have to deal with 10,000 cases or more. I know that in one of our bigger Member States (not Italy) this time they have about 2000 to 3000 customs related cases: small cases sometimes (smuggling of a bottle of vodka, so you can guess which member State I'm talking about), but that type of case also will have to be dealt with by EPPO. We are talking about a lot of cases, but this also makes me say that I think that the EPPO should not deal with *de minimis* cases; probably it will be wise to let that go through the national authorities and the national procedures.

Another example that I'm taking in this context is that the EPPO will also be the one choosing where to prosecute, i.e. the right forum to prosecute. Let us say that he has the option of prosecuting a person in Finland where Finnish criminal code provides for five years imprisonment; or the EPPO prosecutes the case in Spain and for that particular offence the criminal code would provide 20 years imprisonment. You can of course understand that the suspect would rather probably have his case prosecuted in Finland rather than in Spain because there he has 20 years imprisonment potentially. So I think that there has to be some kind of judicial review in relation to this type of decisions. Because the suspect cannot ask a Finnish Court to go to Spain or ask a Spanish Court go to Finland: I don't think that would be possible. So we will probably need to have some kind of European Court, a Chamber of the Court of Justice or something in that relation. I cannot see how we can be without that, in particular in relation to this.

May I also mention another issue, because Mr. Geier mentioned the question of the financial interest. The Council made a so called "general approach" that is a kind of political negotiating position last week on 6 June in Luxemburg. If you are interested, you can read its document in 10729/13: it is a publicly available document on the Council's website. You will also see in that document that the Council states that the legal basis will be changed from article 325 to 83(2) as was also mentioned. And there in the public deliberation (which also can be seen by the way on the Council's website because it was a public deliberation) you will see that the Council's legal service took the floor and said that the fact that Denmark will be out and the fact that Ireland and the United Kingdom will have the possibility of not opting in to the Directive is not to be taken into account when the legal basis is decided. The legal service recalls the Case Law of the Court of Justice that says that it is only objective factors which are amenable to judicial review that should be taken into account; so the procedural consequences of a decision on the legal basis are politically relevant, but not juridically relevant. This was roughly what the Council legal service said in its public statement.

I also recall some themes that we sometimes seem to forget when we talk about the EPPO; because we make some kind of comparison to Eurojust and the Eurojust coordination and encouraging function. I do not think personally that one can compare the two bodies Eurojust and EPPO; even if I am very much in favour of the work of Eurojust. The reason for that is that I think that we're talking about two different concepts. Eurojust is a body which has its main task to coordinate, to cooperate with national authorities. EPPO will be deciding; also deciding over national authorities. How those distinctions will be made, that is a matter for the negotiation. But the Treaty says in article 86 that EPPO is "responsible" (this is the word which is being used) for investigating, prosecuting and bringing to judgment. Eurojust is not responsible for that: it is supporting, coordinating and so on. But Eurojust does not take any decisions. EPPO decides; EPPO directs the investigation; EPPO will put obligations on the Member States' national authorities to cooperate. And this is the key point, because this is what causes a lot of discussion and a lot of problems in relation to constitutional law in particular. Here in Italy I remember the discussions on the European Arrest Warrant in 2001 and the constitutional protection of prosecutors in this country. I don't know if the constitution has been changed or not, but certainly at that time when we studied the Italian Constitution, we saw how constitutionally protected the prosecution authorities are in Italy. But of course here again one could say, as I started to say, "this is no problem, really, that you have a constitution which protects the prosecutors because here they will prosecute on behalf of EPPO. And they will do that with the legal basis a Regulation; and that Regulation even has primacy over constitutional law. And it will in fact be part of the Italian law. So where is the constitutional problem?" I think that there is of course a problem here; but is it really a problem under constitutional law or are we making this a problem when we analyze the whole spectre of our problems here? I'm just putting the question here.

EPPO is a very difficult project. We have been talking about this for nearly 20 years; and now when you start to draft and to put the thinking on paper, one realizes how difficult the project is. In relation to the fundamental rights issues, for sure the rights of suspects, the decisions on coercive measures, who is taking them in relation to the judicial supervision, does the European Court of Justice have a possibility, even to see these types of cases? Because the Court of Justice is like any other European Union institution based on the principle of conferred powers. Have we conferred these types of powers of judicial supervision on the European Court of Justice? There are various meanings and various opinions on that issue.

Not mentioning all the other questions relating to exchange of information, work with the third countries and so on, let me make a point that some of these cases are actually linked to the structures, or some of the solutions are linked to the structures, that the European Commission will propose. What we understand from the Commission, they have said that publicly and Mrs. Reding was quite outspoken recently, just as in her video message as well, is that the Commission will propose seemingly a Chief Prosecutor perhaps with some deputies; and then they will have delegates with double hats in each member State; and these dele-

gates are the ones that will prosecute and investigate under national law. So it seems that the European Commission believes that these delegates (the “double-hatted” delegates) will solve more or less any problems because they are doing this under national law. I think that it is a viable solution; but I think also that the double hat creates also some problems which will have to be solved if one were to adopt that method; and that is in particular the question of the fact that you will have two masters.

So how will this be solved in practice? I think that this will be one of the more difficult topics in the negotiation that we will have. I still remember what a Prosecutor General from the Czech Republic said in a conference in Berlin in February of this year. He said: “if I have a prosecutor who doesn’t obey me or who doesn’t do what I want, whether or not he’s EPPO or not, I can move him because he’s mine: I pay his salary among other things”. And that’s another question: who will pay the salary of the double hat and what about his pension rights? It’s very difficult all this.

Let me also say that we are discussing these questions relating to minor cases, we have also discussed the issue concerning VAT Fraud and there the common approach of the Council is now that VAT is not inside the text. So we will see this will be one of the topics that we will have to discuss with the European Parliament. But there were in fact a very strong majority of the member States that took the floor in the Council and that is taking the floor previously; so it will be a very difficult issue, I can already now predict. We have also discussed quite a lot of issues of exclusive competence of the EPPO: should the EPPO actually have exclusive competence even when the case concerns only one member State? One can ask the question, but possibly there would be a reason for that and that is that member State is not deficient in prosecuting the Union’s financial interests; so that may not be a reason for excluding that from the competence.

Let me recall that there have to be some rules for cooperation between the EPPO and the national authorities rules regarding reporting obligations’ rules; regarding urgent measures before any decision on opening over the investigation has been taken, rules regarding access to national registers for instance. EPPO perhaps might not need so often to have access to a DNA Register, but it sure should have access to license plates and things like that which are important in national investigations.

Then we have the whole block of discussions: what will happen if we have an enhanced cooperation; and what will happen with the cooperation with the non-participating member States? Denmark for sure we know will be out totally of EPPO because they haven’t had the referendum that is necessary yet; and UK and Ireland will most probably also be out. Certainly, UK has it inscribed in their European Union Law that they will not come into the EPPO unless there is a referendum. And then, what will happen to the EPPO’s cooperation with third countries? Because EPPO is not a contracting party to the organized Crime Convention of the United Nations (the Palermo Convention): so can EPPO send rogatory letters? And can that be done via the national delegate?

There are a number of questions; there are also some solutions in relation to all these issues. For instance, there are also some member States that believe that

a collegiate model is a much more viable option than one single prosecutor; because that would create more legitimacy for the prosecutor if the orders come from a nationally nominated, but independent, prosecutor that might make it more palatable for the Member States. But we will see all this is up for negotiations: they will start during the Lithuanian Presidency; and I think that we will have quite interesting discussions in this project which is so difficult. So I think that it is a project of such magnitude that it can be compared to setting up the Euro.

II session



Protection of the  
Union's interest,  
cross-border  
investigations and  
protection of  
fundamental rights in  
the European and  
national case-law



# Protection of fundamental rights in relation to transnational crimes affecting EU's financial interests

*Check against delivery*

## **Yves Bot**

*Advocate general at the Court of Justice of the European Union*

*Referring to the case law of the Court of Justice, the author focuses on the relationship between fundamental rights and the principle of mutual recognition as the main instruments for the implementation of the Area of Freedom, Security and Justice. The author concludes his reflections on the subject by pointing out that the spirit behind the establishment of the European Public Prosecutor's Office is one of progressing from cooperation to co-ordination.*

First of all, we must bear in mind that the European Public Prosecutor's Office (EPPO) will, by nature, be a judicial body acting at a European level, within the framework of a European system composed of different National judicial structures.

What does "National judicial structures" actually mean?

A judicial structure is a set gathering indissolubly substantive and procedural law, describing, first what offences consist of and, second, how to prosecute them.

In so far as the treaties provide that the EPPO will act through the national Prosecuting Authorities with a transnational competence, the EPPO, although it will enhance a Common Penal Policy, will have to deal with various types of national legislation and procedures. In other words, we will have a transnational body operating through national and non-harmonized judicial systems.

In that light, prosecuting a transnational crime, the elements of which have been committed in different countries and sending it before a single Court is an enormous challenge.

Until now, the increase in penal law in the Union was ensured on the basis of the principle of mutual recognition. This principle, the famous cornerstone of the Area of Freedom, Security and Justice, was, and still remains, a very useful and effective tool for judicial cooperation.

Very often, the question arises as to whether the full implementation of the principle of mutual recognition has, regarding the fundamental rights, negative effects.

For that reason, in the first part of my contribution I will set out how the Court's case law has shaped the way within which mutual recognition and fundamental rights can act harmoniously.

In the second part, I will examine if, as a consequence of the nature of the EPPO, mutual recognition has not reached its limits.

At the beginning of my presentation, I would like to draw your attention to what is for me a very crucial point. We are referring to a very particular and spe-

cific part of the Area of Freedom, Security and Justice: a criminal area. Criminal law has its own logic, related to the protection of public order, which one expects to be applied in the same manner throughout its area of competence.

### THE RELATIONS BETWEEN FUNDAMENTAL RIGHTS AND MUTUAL RECOGNITION IN THE AREA OF FREEDOM, SECURITY AND JUSTICE

In that regard, the European Court of Justice has recently issued two decisions - I will examine both of them.

#### THE FRANSSON DECISION

The Court defined the conditions under which the Charter is applicable. Before that judgment, scholars and practitioners were, and apparently still remain, divided into two opposing camps.

Was the Charter applicable only when Member States were “implementing” Union law, or, in a broader sense, when the situation was simply “within the scope of the Union law”?

On at least in two occasions the Court avoided answering the question despite the Advocates General involved in those cases urging it to choose a broader interpretation.

In Fransson case, the Court stated in favor of the broader sense, in opposition to the opinion of the Advocate General who proposed it a mid-way solution between the two extremes.

It is well known that that Grand Chamber decision has not been unanimously welcomed by commentators. I personally agree with the Court’s decision for many reasons and especially for a reason which, to date, has not been highlighted one: the question referred to the Court was of a criminal nature and, therefore, any other solution was inconceivable.

The national judge wanted to know if the *ne bis in idem* principle was applicable between an administrative judgment, and more precisely a fiscal judgment, and a clearly criminal one, both concerning the same facts. In as much as the legal question was of criminal nature, and it undoubtedly was, the Court had no other option than to state in the way that it did.

The Court was not allowed to decide otherwise: it was clearly impossible for the Court to state that the Charter was not applicable in the field of penal law. Had the Court stated in that sense, it would have been impossible to ensure the total and uniform protection of the individual liberties throughout the Union guaranteed by the Charter, which is itself part of EU primary law. How can one explain to national jurisdictions and also to citizens that it is not possible to invoke fundamental rights automatically in the matter where, by nature, they must be always present? And moreover, to circumvent the difficulty stemming from such a decision the sole remedy consists of invoking the theory of the fundamental principles of the Union law. As everybody knows, the general principles of the Union, *the ne bis in idem* principle being one of them, are applicable when the question at stake is in the field of Union law.

In my personal opinion, it must be clear that the Charter is applicable by nature in the scope of the criminal matters.



Does the principle of mutual recognition adversely affect fundamental rights? That's the point to which we will now turn.

### MELLONI AND RADU DECISION

Radu and Melloni were two persons who had been convicted and sentenced and were the subjects of European Arrest Warrant (EAW)

Both argued that the EAW infringed fundamental principles. In each case the Court rejected the complaint.

Radu reproached the issuing court for not having organized a meeting before delivering the warrant. Such an argument can be considered as astonishing because the principle of an arrest warrant, European or national, is for it to be delivered when the suspected or sentenced person is absent. The question would have been different if an infringement of fundamental rights had been committed, *quod non*, during the procedure leading up to the judgment.

Melloni based his argument on article 53 of the Charter in order to obtain a refusal to surrender from the Spanish jurisdiction. Sentenced *in absentia* in Italy he argued that Spanish Constitutional law was more protective than the provision of the framework decision. It's clear that Spanish Constitutional law forbids the execution of a sentence pronounced *in absentia* if there is no certainty the case will be re-examined before being executed.

On the contrary, the framework decision provides that execution is possible in certain circumstances, which were fulfilled in the case at stake, namely that the prosecuted person was clearly warned of the date of the hearing as well as of the consequences stemming from his absence.

To my mind, the most important part of the reasoning of the Court is set out in paragraph 59 and following points of the decision.

First, shaping the general frame governing each aspect of the Union, the Court recalls that in accordance with its settled case law concerning the principle of primacy, national rules cannot undermine the effectiveness of EU law on the national territory.

Consequently, since the rules provided for by the framework decision do not infringe fundamental rights, the national constitutional provisions are not allowed to undermine the effectiveness of the framework decision.

Stating otherwise, the Court would have reintroduced the possibility for the Member States to escape the common architecture of the area of freedom, security and justice, restoring at the same time the reasons why those same Member States decided to give the principle of mutual recognition such a prominent role as the corner stone of construction of this area.

It must also be borne in mind that Article 82 of the Treaty recognizes the principle of mutual recognition as officially being the main tool of the construction of that area. To limit that role is to stand in the way of the Treaty.

Authors have put forward the idea that such a decision was dangerous if a surrender was requested by a jurisdiction which was part of a system apparently in accordance with the principles of democracy but, in fact, infringing fundamental freedoms in the way it functioned.

Despite this hypothesis can be held as fully theoretical, the question it is to be

examined because it reveals an important aspect of the philosophy of the mechanism of the EAW the authors have not taken in account.

The most important change introduced by the framework decision consists of giving the EAW a fully and exclusively judicial nature.

It's commonly accepted that a judicial system is fundamentally the guardian of the freedom of individuals. If the situation described above occurs it will be for the requested jurisdiction to decide whether or not the conditions of the functioning of the requesting authority is in compliance with the principles enshrined in the Charter, and in the end refuse the surrender.

That was the sense of the opinion I expressed in the Mantello case (point 9 and 10):

“9. ...although the system of the European arrest warrant does indeed rely on a high degree of mutual trust, the fact remains that the surrender of the person referred to in such a warrant stems from a decision by the judicial authority of the executing Member State, 3 which must be taken in a manner consistent with fundamental rights. I will point out that Article 3(2) of the Framework Decision is an expression of the *ne bis in idem* principle, which constitutes a fundamental right recognized by the legal systems of all the Member States and enshrined in the Charter of Fundamental Rights of the European Union.

10. I will thus infer that, although, in accordance with the principle of mutual recognition, it is not for the executing judicial authority to ascertain of its own motion whether that principle is being observed, the fact remains that it cannot execute a European arrest warrant if it has sufficient evidence that that principle has been infringed, including in cases in which the acts have already formed the subject-matter of a final judgment in the issuing Member State”.

The fact that the Court did not refer to that point of the opinion in its judgment does not mean, to my mind, that it condemned the reasoning.

It is evident that in such a situation, the simple examination of the EAW would make it clear if any infringement of the fundamental rights of the sentenced person was committed during the procedure leading up to the conviction. In such a situation, the requested tribunal would find in Radu the legal basis to refuse the surrender.

However, the principle of mutual recognition is not the magic tool to build a harmonious Union penal system.

### **HAS THE PRINCIPLE OF MUTUAL RECOGNITION REACHED ITS LIMIT?**

To my mind, creating a real prosecution service leads compulsorily to examining if there is a risk the new system will infringe the principal of legality.

As provided for in the Treaty the philosophy of the new system consists of giving a unique jurisdiction the competence to judge individuals who committed illegal acts linked with each other with the same criminal intent (*mens rea*) in two or more Member States. It's clear that for each part of the material acts perpetrated on its territory each domestic law will have a proper qualification regarding the definition of the facts and the level of the punishment. If one can imagine that the differences between the qualifications would not be the most important part of the difficulty thanks to some harmonizing directives it would clearly be different re-

garding the level of the punishment.

Even the most recent directives oblige Member States not to provide for precise punishments, but only for a scale. As a consequence, each Member State has the total freedom to choose the sanction it considers appropriate.

The jurisdiction chosen by the EPPO to judge the whole law-breaking action will have to deal with different sanctions provided for, partly by its national law applicable to acts committed in that jurisdiction's country, and partly by foreign laws. If for the same act the sentences provided for by the *lex fori* are not identical as those provided for by the foreign laws, what will judges have to do? Apply the domestic law to acts committed abroad or apply the foreign law? The latter solution may appear attractive, but its implementation will herald a small revolution. Currently, the normal rule in accordance with the fundamental principles of penal law leads to the application of the jurisdiction's national law.

In fact, the spirit of the new system, which I totally support, is to substitute cooperation for coordination. In a system aimed at cooperation, one judge asks another judge for help in order to punish criminal acts committed on the territory of the requesting judge, in violation of the requesting judge's law. In a system of coordination a judge will have to judge facts partly falling within the jurisdiction of a foreign judge and that makes a huge difference.

# The establishment of the European Public Prosecutor and the right to a fair trial

*Text sent by the author, read at the conference*

## Vladimiro Zagrebelsky

*Former Judge of the European Court of Human Rights*

*In reference to articles 325 and 86 of the Treaty on the Functioning of the European Union (TFEU), the author believes that differences are likely to persist in substantive law at the national level. He highlights the lack of any reference to accessory offences in the Treaty and emphasizes the need to develop precise and clear criteria for determining the Member State for prosecution to take place. The author then focuses on key requirements that the regulation establishing the European Public Prosecutor must satisfy to be compatible with the European Convention of Human Rights and Fundamental Freedoms (ECHR) (independent status of the European Public Prosecutor, procedural safeguards and the rights of the defence, judicial review of the European Public Prosecutor's Office).*

I shall look at some of the fundamental rights in the European Convention of Human Rights (Article 6) and the EU Charter of Fundamental Rights (Art.47) in relation to the establishment of the European Public Prosecutor's Office as an organ of investigation and prosecution of crimes affecting the financial interests of the Union (initially) and transnational crimes(subsequently).I shall refer to the case law of the European Court of Human Rights, which refers the Convention and also, consequently, the Charter.

One has to consider the possibility of an appeal to the European Court of Human Rights in the case of violations arising during criminal proceedings conducted by the European Public Prosecutor. The actions of an EU body, such as the planned European Public Prosecutor, and a national judicial body raise the issue of responsibility as regards possible violations of human rights (e.g. violations in terms of evidence gathered by the prosecutor and then used in a trial). This applies to current and future situations should the EU accede to the European Convention on Human Rights.

It should also be pointed out that the presumption of equal protection of fundamental rights guaranteed by Community institutions, as set out by the Court in *Bosphorusv.Ireland* (and later used extensively), may-and indeed, should be eliminated from the jurisprudential landscape once the EU has acceded to the Convention and its system.

Eurojust is a body provided for by Article 85 TFEU, and Article 86 TFEU states that a European Public Prosecutor can be established *starting from Eurojust*, whose sphere of competence will initially be limited to offenses against the financial interests of the Union and subsequently extended - through the special procedure

laid down in paragraph 4 –to serious cross-border crime.

Article 325 TFEU obliges the Union and Member States to combat fraud and any other illegal activities against the financial interests of the Union, through disuasive and effective measures. It also provides for regulatory actions that can ensure “effective and equivalent” protection in all Member States. “Equivalent and effective” does not mean that domestic legislation need be identical in each Member State, or that the definition of criminal offenses or the nature and extent of punishments are the same. It is, therefore, possible and even probable that in terms of substantive criminal law, national legislation will continue to be diverse. Article 325 TFEU merely requires that the means of combating fraud against the financial interests of the Union are the same as those adopted in Member States to punish fraud against their interests.

“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, as determined by the regulation provided for in paragraph 1. “The European Public Prosecutor “shall exercise the functions of prosecutor in the competent courts of the Member States” (Article 86.3 TFEU). The definition in the Regulation of the offenses within the sphere of competence of the European Public Prosecutor will clarify whether the office will investigate all fraud against the financial interests of the Union or only those of a specifically cross-border nature. In this second case a role could be played by the criterion of subsidiarity (Article 5 TEU), which could lead to the conclusion that the European Public Prosecutor would act only if and when the national public prosecutor is unable to act effectively. In any case, when a crime has taken place in several Member States, the choice of the national court where the trial is to take place is an extremely important one from the point of view of procedure and substantive criminal law. It will be necessary, therefore, to establish very precise and binding criteria for determining the Member State where a crime is to be prosecuted. Otherwise a delicate problem would arise in terms of “legal certainty” (Article 7 Convention). Vague or discretionary criteria, impacting on the choice of the applicable national law may exclude “legal certainty” which is required for the purposes of the application of the Convention.

This is a serious problem, an effect of the decision to establish a European Public Prosecutor’s Office that operates before and under the control of national courts.

A clear definition is needed to qualify the regulations for concurrent offenses, not in themselves affecting the financial interests of the Union, not mentioned in Article 86 TFEU. Different concurrent offences may accompany the commission of single acts carried out in different states, which, combined, constitute fraud against the financial interests of the Union.

Article 86 TFEU, paragraph 3, states that the regulations “shall determine the general rules applicable to the European Public Prosecutor’s Office, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions.” This seems to exclude a solution by which the European Public Prosecutor’s Office would follow the preliminary investigation pro-

cedures envisaged by the law of the national court before which the Prosecutor performs his or her functions. This solution would have eliminated any question specifically concerning the compatibility of the action of the European Public Prosecutor with the European Convention on Human Rights (in that the only problems would concern the European state in question).

The choice settled on in Article 86/3, instead, involves the establishment of a set of wide-ranging procedural rules, specific to the action of the European Public Prosecutor in whole territory of the Union: rules also impacting the discipline that governs the action of the judge, with the derogation of national legislation, on the admissibility of evidence and the judicial review of the procedural acts of the European Public Prosecutor. The first and the second aspect require modifications to national laws that also affect the trial phase. The judges also, and not only the Public Prosecutor, are subject to the required regulatory changes.

Clearly then the rules introduced by the regulations will be wide-ranging and extremely delicate nature, added to which is the difficulty of defining rules compatible with the many and diverse procedural (and constitutional) systems of Member Countries. In referring to the diversity of procedural systems defined at constitutional level, I am alluding to the risk of incompatibility, which brings up the question of “counter-limits.”

I shall now look at the main requirements under the European Convention on Human Rights.

a) Concerning the status of the European Public Prosecutor. The Convention does not oblige Member States to follow to any specific constitutional theory regarding the limits of and the interactions between state powers (*Sacilor Lormines v. France*, November 9, 2006, § 59; *Pablakyv.Finland*, 22 June 2004, § 29; *Kleyn and Others v. Netherlands*, May 6, 2003, § 193). This has direct implications on the requirements of *status* under the Convention with regard to the public prosecutor (and even judges). The European Court of Human Rights has never held that the fairness of the trial (Art.6 Conv) necessarily requires an independent Public Prosecutor, nor that the system of mandatory prosecution is the only one acceptable.

Naturally a solution that assigns to the European Public Prosecutor a status that is independent from the other bodies of the Union (and those of the Member States) is compatible with the Convention, and indeed it seems advisable if one takes account of the Council of Europe Recommendation CM Rec (2000)19), which takes into account both systems: those in which the prosecutor is independent of the executive and those in which the government, in one way or another, directs the activities of the Public Prosecutor in the performance of his or her functions. Paragraph 16 of the *Recommendation* states that “Public prosecutors should, in any case, be in a position to prosecute without obstruction public officials for offences committed by them, particularly corruption, unlawful use of power, grave violations of human rights and other crimes recognised by international law”. The crimes involving fraud against the Union often involve public officials and the actions or omissions of government agencies, so that the mention made in the above Recommendation is pertinent. Paragraph 11 of the recommendation states that “... the public prosecution should account periodically and publicly for its activities as a whole and, in particular, the way in which its priorities were carried out.”

b) The rules of procedure and the admissibility of evidence. As for the rules of procedure to be followed by the European Public Prosecutor, it should be borne in mind that in criminal matters Article 6 Convention aims primarily to ensure a fair trial before a “tribunal” that is competent to decide on the merits of the case (*Hany v. Italy* (dec.), 6 November 2007; *Berlinski v. Poland*, June 20, 2002, § 75; *Brennan v. UK*, 16 October 2001, § 45).

Article 6, however, does not ignore the pre-trial phase (*Salduz v. Turkey*, 27 November 2008, § 50; *Sarikaya v. Turkey*, 22 April 2004, § 64; *Laskaand Lika v. Albania*, April 20, 2004, §62). The guarantees provided apply to the entire proceedings, including the preliminary investigation phase (*Pandy v. Belgium*, 21 September 2006, § 50; *John Murray v. UK*, 8 February 1996, § 62). In general, Article 6 ECHR comes into play in the pre-trial phase if the fairness of a trial as a whole risks being affected by an initial non-compliance with these requirements (*Zaichenko v. Russia*, 18 February 2010, §36; *Öcalan v. Turkey*, May 12, 2005, § 131). A denial of the guarantees of due process during the pre-trial phase could affect the fairness of a judgement (*Vera Fernández Huidobro v. Spain*, 12 January 2010, § 109; *Panovits v. Cyprus*, 11 December 2008, § 64). Preliminary investigations are often of decisive importance (*Diallo v. Sweden*, 5 January 2010). In addition, the accused is often in a particularly vulnerable situation during investigations (*Salduz v. Turkey*, cit., §54). This vulnerability can be assuaged with the assistance of a lawyer as of the first interrogation.

In the activities of the European Public Prosecutor and during the trial brought before a national court, it may easily happen that some of the evidence comes from a state other than the one in which the trial is taking place. In itself, this is not a major problem as regards the rules set forth in Article 6 Convention, in the sense that the applicable criteria are those based in particular on Article 6/3 d) (right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him), and as regards the evidence, if it has been obtained in violation of other rights under the Convention. The provisions of the Convention will have to be taken into account, in any event, by the trial court.

Regarding the first aspect, Court case law establishes that the accused must be given adequate and proper opportunity to challenge and interrogate a witness against him (*Saïdi v. France*, 20 September 1993, § 43; *Lüdi v. Switzerland*, 15 June 1992, § 47). However, the rights of the defence are restricted in a way that is incompatible with the guarantees of Article 6 when a conviction is based solely or mainly on statements made by a person who, for whatever reason, the accused was unable to question or have questioned either during or after the preliminary investigation (*Orhan Cacan v. Turkey*, 23 March 2010, § 37; *Majadallah v. Italy*, 19 October 2006, § 38; *Bracci v. Italy*, 13 October 2005, § 55).

As regards the second aspect, the Court examined cases in which the evidence, the admissibility of which is under discussion, contrasts with Article 6 and other provisions of the Convention. The Court makes a distinction according to the type of law violated. In the case of a relative right (e.g. right to respect for private and family life, guaranteed by Article 8 Convention), in the case of evidence contrary to the Convention the accused may challenge its authenticity, usability, degree of

reliability and the presence of other elements used to corroborate its reliability (*Lee Davies v. Belgium*, 28 July 2009, § § 42-54; *Dumitru Popescu v. Romania (n.2)*, 26 April 2007, § § 106-111; *Allan v. UK*, November 5, 2002, § 43; *Chalkley v. UK*, 26 September 2002). The Court's case law is stricter as regards the violation of due process when the evidence has been collected in violation of Article 3 Convention (prohibition of torture and inhuman or degrading treatment) (*Gäfen v. Germany*, June 1, 2010, § § 165 et seq.).

c) The judicial review of the Prosecutor's activities. With regard to liberty of person, the subject of Article 5 of the Convention, a judge or an officer authorized by law to exercise judicial power may review the legality of a restrictive measure. The reference to the latter authority has given rise to problems of interpretation. There is no doubt, however, that for the purposes of Article 5 Convention, this authority, although not a judge, should have certain characteristics. First of all, it must be independent of the executive and the parties (*Schiesser v. Switzerland*, December 4, 1979, § 29) and impartial. The prosecutor's office carries out investigations and is a party in the proceedings, though representing the state, so it does not correspond to the authority mentioned in Article 5 (*Huber v. Switzerland*, 23 October 1990; *Klamecki v. Poland*, April 3, 2003, §105; *Kawka v. Poland*, June 27, 2002; *Dacewic v. Poland*, July 2, 2002; *Pantea v. Romania*, June 3, 2003; *Moulin v. France*, 23 November 2010, § 59). As a result, the "rules applicable to the judicial review of procedural measures" taken by the Prosecutor (art.86/3 TFEU) must ensure that measures restricting liberty of person, taken as part of the preliminary investigation, shall be subject to judicial review in accordance with the rules set out by Article 5 Convention.

The non-judicial nature of the Public Prosecutor, as expressed by the case-law on article 5 Convention, broadens the theme of judicial review of the activities of the European Public Prosecutor. The question arises of how the prosecutor is to act in the case of searches of a person or domicile, phone-tapping, etc., as regards the need for judicial review or authorization. The answer is found in Article 8 Convention, in relation to Articles 13 and 6 Convention, which states that, in the case of interference in a person's private or family life, he or she shall have effective remedy before a National authority. The considerable amount of case law of the European Court of Human Rights on this point is constant. And article 47 EU Charter of Fundamental Rights is no different as to the right of access to a court.



# On the need for the building-up of a European Public Prosecutor

*Check against delivery*

## Antonio Cluny

*Senior Attorney General and Public Prosecutor, Portugal President of MEDEL*

*After pointing out that there is no Portuguese case law on either the validity of OLAF investigations or their compliance with the Constitution and the domestic legal system, the author analyses Portuguese law in relation to offices which perform similar functions to OLAF, to determine the extent to which a court may use evidence gathered by an administrative authority in a criminal investigation. The author finds that minimal use has been made of OLAF investigations by the Portuguese Public Prosecution and supports the conversion of OLAF into a European Public Prosecutor's Office since, according to the author, only an independent judicial authority may collect valid evidence, accepted by national authorities.*

I have gladly accepted the invitation addressed to me as President of MEDEL to participate in this conference organised by Basso Foundation. Apart from acknowledging MEDEL's work in the development of a European common judicial culture, this invitation also represents an opportunity to unfold the position of this European organization of magistrates as regards the draft on the setting-up of an independent European Public Prosecutor.

As Portuguese prosecutor I was also asked to present the Portuguese experience and case-law addressing issues derived from the articulation of OLAF's work with the demands on the protection of fundamental rights enshrined in the Portuguese Constitution and legislation.

Such challenge led me to a deeper research in an area which I am not particularly familiar with, considering that I have been holding office as District Prosecutor in the Court of Auditors for the past years.

Although the Portuguese Public Prosecution Service forms a single body which exercises its powers in all areas - including the financial area in which I am currently involved -, I have failed in finding information worthy of interest for this conference.

The research allowed me to detect the existence of a considerable number of interesting decisions regarding for instance the European arrest warrant.

However, after consultation with some colleagues who have specialised in the area of economic and financial crime at national and international level, it was quite a surprise to find out that there is no Portuguese case-law on both the value of investigations carried out by OLAF and their adequacy to the Portuguese Constitution and the criminal procedure provisions.

In what concerns Portugal, there has been a complaint lodged with the European Ombudsman against OLAF due to a collateral effect of the manner the said body had conducted an inquiry (Case: 1748/2006/JMA).

At first, the absence of national case-law made me feel perplexed and concerned by the possibility of being unable to satisfactorily comply with the obligation I had taken towards the organisation of this Conference.

Furthermore, the suggested theme – Protection of the Union’s interests, cross-border investigations and protection of fundamental rights in the European and national case-law – acquires an increased interest in the sense that it conveys the analysis of the value of evidence collected before and independent from criminal proceedings.

In the financial area where I intervene the value of evidence in the scope of an auditing procedure has experienced an increased interest and concern, notably where the material collected by the Court of Auditors may be of interest to future criminal proceedings.

Reason why I deemed it necessary to take the research to another level in order to establish the direction taken by the Portuguese case-law as regards other bodies that perform functions similar to those of OLAF, namely by reason of the (administrative) nature of their statutes and the powers conferred to them.

In fact, according to REGULATION (EC) No 1073/1999 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF), this Office may only carry out investigative activities of an administrative nature.

Basically, the issue posed to a judicial entity – as it is the case of the Portuguese Public Prosecution Service or a court of justice – is repeatedly the same when confronted with an investigation carried out by OLAF or other bodies entrusted with investigative powers of an administrative nature: what value should be granted to evidence collected by those entities, and to what extent can the collaboration and the clarifications exacted from persons responsible for entities under (national or European) mandatory supervision be used without jeopardizing constitutionally enshrined rights of defence?

In what concerns OLAF, the underlying purpose is the determination of the extent to which a national judicial authority may or may not use evidence collected by an “administrative authority” in a criminal inquiry aimed at producing an indictment.

In this case it is irrelevant to determine whether such authority has national or European origin and statute.

Based upon these findings, I decided to focus my research on the issues that Portuguese case-law has to tackle due to the action of the so-called “independent regulatory agencies”.

In countries like Portugal – and Italy alike – the criminal investigation has to be carried out within the scope and the strict limits of the criminal inquiry as defined in the Criminal Procedure Code.

It must therefore comply with all guaranties and fundamental rights enshrined in both the fundamental rights charters and the Constitution, notably the right to defence in its variables.

The evidence deemed valid for supporting the commission of a criminal of-

fence and the sentencing resulting there from is solely the one laid down by the «criminal inquiry», and the collection of such evidence has to comply strictly with all principles and guarantees ensured by «fairness in criminal proceedings», that is the proceedings that fully meet the fundamental rights, in particular the right to defence.

Portuguese case-law produced by the superior courts – the Constitutional Court and the Supreme Court of Justice – has considered that the *nemo tenetur* principle is incorporated in the constitutional guarantees of defence.

Moreover, the Constitution of the Portuguese Republic extends these guarantees to all sanctioning proceedings, such as those caused by administrative and disciplinary offences. Although the case-law produced by superior courts tries to establish different levels of protection towards different types of proceedings, the guarantees recognised therein are very similar to those required in criminal proceedings.

On this basis and having in mind that the Portuguese case-law has never ruled on any proceedings which addressed the limits of the guarantees of defence in any investigation based upon a procedure launched by OLAF – which is quite meaningful – I decided to ascertain the contents of the said case-law in cases that show some similarity among them.

I tried, thus, to map out the Portuguese case-law rulings on the value of evidence collected by the «independent regulatory entities» as regards supervision and sanctioning of economic activities.

As aforesaid those entities are, similarly to OLAF, administrative entities entrusted with supervision and investigative powers liable to result either in the direct imposition of administrative sanctions or in criminal investigations to be conducted by a judicial authority.

It should be noted that the criminal procedure in Portugal is formally launched by information on a crime occurrence, rather than following the submission of a public or private indictment<sup>1</sup>.

The Inquiry is thus a teleologically bound judicial activity directed by the Public Prosecution Service and subject to strict legal criteria<sup>2</sup>.

Whereas, unless the information on a criminal offence is entered before the Public Prosecutor and the subsequent criminal investigation stage is launched under his direction, no «criminal inquiry» is deemed to exist.

Both the circumstances and the manner under which the said entities obtain evidence in the scope of their regulatory activities – at a first moment – and their investigative and sanction activities – at a second moment - , as well as the value that such evidence is or can be constitutionally granted in the scope of a future criminal proceedings, can represent the basis required to assess the nature that the case-law of the Portuguese courts could acquire should they had been confronted with a criminal proceedings and indictment caused by a OLAF investigation.

The core of this investigation and its usefulness to this approach can be limited

1 Paulo Dá Mesquita – Nótula Sobre o Procedimento para Acusação – VER. CEJ n.º1, 2004, Ed. Almedina.

2 Idem.

to the identification of the extent to which the concepts developed in the scope of the so-called Portuguese «administrative criminal law» are, or may be, compatible with the defence demands that, at the level of the international charters on rights and the democratic constitutions, cover the criminal law and the criminal procedure law.

OLAF is basically a body entrusted with both supervision and investigative powers, although the latter play a far more significant role. In addition thereto, OLAF has also been given plain powers of on-the-spot checks and inspections.

This characteristic, although primarily investigative, does not mitigate the relevance of the comparison we intend to make between the principles applied by the Portuguese case-law as regards the confrontation between supervision powers and investigative activities developed by the «independent regulatory entities» and the core activity developed by OLAF.

The fact that OLAF is basically an administrative investigative body – even if such investigative activity is focused on the detection of mere irregularities and the detection and investigation of true criminal offences – only reinforces the sense of comparison we intend to attain.

The Portuguese case-law analysed extensively the actions of the independent regulatory bodies as regards the collection and validity of evidence, in particular in the light of the right of defence in sanctioning proceedings.

As regards, for instance, the *Comissão do Mercado de Valores Mobiliários* (Portuguese Securities and Exchange Commission) the validity of evidence collected in administrative proceedings – on the fringe of criminal proceedings - and, in particular, the *nemo tenetur* principle is an issue that has been addressed by the Portuguese superior courts.

The teachings resulting from such case-law may, in many cases, anticipate the direction the Portuguese courts will take when confronted with identical issues in the scope of OLAF investigations.

Basically, both OLAF and the said regulatory entities share identical statutes and powers, and both entities carried out only administrative investigations.

Let us examine some of the problems the Portuguese case-law has been confronted with recently.

Having in mind the administrative nature of sanctions liable to be imposed by the Securities and Exchange Commission, as well as the extent (as relative as it may be) of the principles and rights of defence in criminal proceedings, the case-law produced by the Constitutional Court and the Supreme Court of Justice has considered in overall that the use of documents obtained in the exercise of their supervisory powers may be used as evidence in sanctioning procedures.

The Portuguese case-law has thus considered that, as a rule, the duty attached to persons responsible for the inspected entities to hand over certain documents while control activities are carried out by independent regulatory entities does not conflict with the «right to avoid self-incrimination» principle. The same applies to the fact that the concerned documents are liable to serve as basis for the launching of administrative proceedings.

As stated in the Ruling of the Lisbon Court of Appeal dated 15 February 2011, File No.. 3501/06.3TFLSB.L1-5; *“The key-moment in which the Administrative Authorities must put aside the Administration role and take on the role of an administrative authority vested with sanctioning powers is the moment when the information on an administrative offence is transmitted to them. From there on, the procedural guarantees granted to the persons against whom the administrative proceedings were launched by the Administrative Authorities in compliance with the principle of legality come into force (art. 43 of the RGCOC)”*.

This opinion is seconded by another Ruling of the Lisbon Court of Appeal dated 6 April 2011 which, nonetheless, enhanced the obligation imposed on both the controlled entities and the supervision entities to collaborate with each other.

Case-law is truly undemanding in what concerns the evidential use of information and documents used during the supervision stage in future administrative sanctioning proceedings (Ruling No. 461/2011 of the Constitutional Court).

However, the superior courts - Constitutional Court and Supreme Court of Justice - have a stricter position as regards the evidential use of «additional clarifications» requested by the «independent entity» (in the exercise of its supervisory powers) to the persons responsible for the supervised entities.

This position becomes particularly conspicuous if the concerned persons are not advised in advance of the possible sanctioning purpose aimed at by the concerned clarifications (Ruling of the Supreme Court of Justice No. 1/2003 dated 25 January 2003).

In a Ruling dated 17 April 2012 the judges of the Lisbon Court of Appeal construed the doctrine established by the above Ruling of the Supreme Court of Justice more drastically by stating that certain witnesses cannot be compelled to testify in court in criminal proceedings if they are defendants in ongoing administrative proceedings for the same facts or facts connected thereto, and they have not been compelled to testify in the scope of the said administrative proceedings.

As regards the specific possibility of using co-defendants' statements produced during the investigative stage, several Rulings of the Constitutional Court and the Supreme Court of Justice (Constitutional Court's Rulings No. 133/2010 and No. 181/2005; Supreme Court of Justice's Rulings No. 97/06 and No. 304/2004) establish some limits thereto, although in a less restrictive manner.

Case-law does not seem to be very restrictive; nonetheless it must be outlined that we are referring to administrative sanctioning proceedings in relation to which the Constitution of the Portuguese Republic is less demanding as regards the interpretation of the right to defence.

Indeed, none of the aforesaid judicial decisions seeks to analyse the value of evidence collected in previous administrative investigations liable to result into criminal proceedings, as it is the case of the investigations conducted by OLAF.

Such investigations aim preferably at assessing, in a less or more demanding manner, both the *nemo tenetur* principle in the scope of administrative sanctioning proceedings and the situations in which the entities whose activities are subject to supervision are compelled to provide certain documentary information and clarifications thereto.

This is not the most demanding scenario that can be portrayed within the crim-

inal procedure law.

The restrictive use of statements or information produced by the above said responsible persons during non judicial investigations as criminal procedure evidence can be easily construed from the existing case-law

In this particular case, such restriction would have to be extended given the fact that the criteria threshold to be met as regards the guarantees of defence in criminal proceedings – notably the *nemo tenetur* principle – are vested with an accrued demand by the case-law.

This is likely to explain the absence of Portuguese case-law on the validity of evidence collected by OLAF in criminal proceedings launched by the Portuguese Public Prosecution Service: in fact no indictment has been sustained mainly by evidence collected during investigations conducted by OLAF, nor has such evidence been replaced by or completed through the addition of evidence validly collected by the Public Prosecution Service during the criminal inquiry stage.

This is why no controversy has arisen in superior courts over these cases.

The absence of national case-law and the minimal use of OLAF's investigations by the Public Prosecution Service result into a lower level of efficiency as regards criminal proceedings that can be extracted from the activities of a body entrusted with an administrative investigation profile such as that of OLAF.

In Portugal most of these issues have been the subject of doctrinal debate for a long time.

The "*Alta Autoridade Contra a Corrupção*" (Anti-Corruption Authority) was set up in Portugal in 1983.

It was an independent entity led by a High Commissioner, whose decisions were not subject to the Government's corroboration.

Much was then written on both the nature and the powers of this entity.

The legal and constitutional nature of the Anti-Corruption Authority, as well as the articulation of its powers, were issues under debate.

Finally, in May 1986 the Consultative Council of the Prosecutor General's Office - a legal advisory body based in the Prosecutor General's Office - issued a legal opinion intended to clarify the issues the courts were confronted with due to the initiatives taken by The High Authority.

According to the Consultative Council, the Anti-Corruption Authority was a mere administrative entity devoid of authority to engage in criminal investigation or criminal file organization activities.

Furthermore, the Consultative Council of the Prosecutor General's Office restricted the level of collaboration between the judicial entities and the High Authority, in particular the access of the High Authority inspectors to judicial proceedings entrusted to the Public Prosecution Service or the Examining Magistrate while under judicial secrecy pending criminal investigation (*segredo de justiça*).

In addition thereto, the Consultative Council was of the opinion that the High Authority was – in turn - compelled to provide all information and forward all elements and documents deemed necessary for the development of judicial investigations.

Summing up, the Consultative Council of the Prosecutor General's Office con-

sidered that the Anti-Corruption Authority was not in a position to ensure the «judicial guarantee», and that only the judicial entities - Public Prosecution Service and Examining Magistrate – could conduct criminal investigations or order their execution.

This assertion should trigger a in-depth reflection.

It is possible and desirable to keep a structure with the investigative potential of OLAF without drawing the useful effects there from as far as criminal prosecution expertise in the economic and financial area is concerned?

In view of the announcement and development of projects aiming at the OLAF's conversion into a judicial entity such as a European Public Prosecutor should be portrayed, we believe that the need to move in that direction raises no doubt whatsoever.

On 23 May 2013, in Brussels, MEDEL advocated the need to take such a direction.

Pursuant to the case-law produced by the European Court of Human Rights (23 November 2010) such a Public Prosecutor would have to be considered a «judicial entity» within the meaning of the European Court of Human Rights: an independent entity that would not be required to follow guidance on the opportunity and the way to conduct criminal proceedings..

The decisions of the European Court of Human Rights on the French Public Prosecution Service and its capacity - as «judicial entity» - to order and implement measures during the investigative stage are a practical example of concern about the need to ensure conditions of objectivity and impartiality to such an entity, which should raise everyone's awareness.

In the light of the fundamental rights charters only a «judicial entity» and consequently an independent entity may undertake objective measures during the investigative stage and collect valid evidence likely to be accepted as such by the national authorities in the scope of a criminal investigation.

An independent judicial entity – that is the only acceptable profile for the European Public Prosecutor.

An issue must still be tackled: what kind of relationship will an independent European Public Prosecutor be able to establish with national public prosecution services that are deprived of such feature?

To what extent can this *capitis deminutio* as regards the independence of the statutes of some European Public Prosecution Services contribute to undermine the objectives and procedural powers of an independent European Public Prosecutor?

MEDEL is in favour of an immediate definition of minimum European standards on the independence and autonomy of magistracies within the European Union, in respect of both the statute of the various national Public Prosecution Services and the bodies that are to guarantee the magistrates' independence: the High Councils.

If no harmonization is attained and no progress is made towards the consolidation of an independent European justice, it will be almost impossible to achieve coherence between the fundamental rights and procedural principles that the European Court of Human Rights recognizes and requires in order to ensure the suc-

cess of an European Public Prosecutor.

Much of the work needed to attain such purpose has already been developed by the Council of Europe in what concerns the documents produced by its various bodies: Consultative Council of European Judges (CCJE), Consultative Council of European Prosecutors (CCPE), European Network of Councils for the Judiciary

Some of those documents take the form of Resolutions of the Council of Ministers.

The time has come to put under discussion empathically the need to launch such a procedure.

We, for our part, are willing to participate entirely in the debate over such procedure.



# The protection of fundamental rights in Italian case law

*Check against delivery*

**Ernesto Lupo**

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*The author focuses on the impact of the protection of fundamental rights on the protection of the rights of the suspect at national level and points out that recent Italian case law refers to Article 46 of the ECHR, which requires States parties to comply with the judgments of the Court of Human Rights in Strasbourg. The author hopes that the European Union will pursue the adoption of a uniform set of procedural guarantees and safeguards that cannot fail to be applied also to cross-border investigations.*

## THE IMPACT OF EUROPEAN PROTECTION OF FUNDAMENTAL RIGHTS ON THE ITALIAN SYSTEM OF PROTECTION OF PERSONS SUBJECT TO CROSS-BORDER INVESTIGATIONS.

Due to the work I have been doing recently, and the presence in this session of the conference of other speakers who have worked in the European Courts, I shall limit my analysis to Italian case law. I shall consider, therefore, the protection of fundamental rights as they have emerged from the rulings of the Italian Constitutional Court and Court of Cassation, in so far as they may be relevant to cross-border investigations, which are currently carried out by OLAF and in future, by the European Public Prosecutor, as provided for in Article 86 TFEU.

The rights under consideration essentially regard the area of criminal law, in the broad sense, including administrative penalties of a punitive nature, in accordance with the Strasbourg Court's interpretation of Article 7 of the ECHR.

Indeed, cross-border investigations undertaken to verify the commission of offences against the financial interests of the European Union involve the rights of defence of those subject to the same investigations. And these rights are primarily provided by laws regarding criminal proceedings, as laid down in our Constitution and Code of Criminal Procedure.

A full consideration of the subject of my lecture would thus require an analytical examination of adjective law, as regards the protection of fundamental rights of persons subjected to investigations that may lead to criminal proceedings. But this would mean extending our discussion (impossible here) to the entire Italian Code of Criminal Procedure, its content and even the relative constitutional principles.

In the quest for greater uniformity in the protection of the fundamental rights of persons under investigation, an aim which would seem essential given the concrete possibility that cross-border investigations will become increasingly widespread, I think it appropriate to limit this lecture to the effects that the European protection of fundamental rights has on Italian protection of the rights of the suspect, as currently interpreted in Italian case law.

## THE EFFECTS OF THE JUDGMENTS OF THE COURT OF HUMAN RIGHTS

After a long period in which the ECHR was given little consideration and was applied only sporadically in Italian case law, now it is directly applied in domestic law and has a binding force on national legislation, which is obliged to comply with its provisions. As a rule, any domestic laws conflicting with the Charter are unconstitutional because they violate the precept (imposed on national legislation by Article 117, first paragraph, of the Constitution) of complying with the terms and conditions of international obligations.

The fundamental rights enshrined in articles 5-7 of the ECHR are important for the matter we are considering here in so far as they may be invoked in proceedings instituted in Italy following cross-border investigations conducted by European bodies. We should, in fact, bear in mind that the future European Public Prosecutor, “responsible for investigating, prosecuting and bringing to judgment ... the perpetrators of crimes affecting the financial interests of the Union”, will also have to bring prosecutions “before the competent court authorities of the Member States” (art.86.2 TFEU).

a) **On parties in proceedings before the Court of Strasbourg.** These principles (undisputed after the Constitutional Court judgments no. 348 and 349 of 2007) mean that Article 46 of the ECHR, which obliges Italy “to abide by the final judgments” of the Court (of Strasbourg) in disputes in which it is part, is fully effective.

The direct binding effect of these judgments (for the benefit of the suspect who may have successfully lodged a complaint before the Court of Human Rights regarding the violation of the Convention) has, recently, found an apposite procedural instrument in the review of the preliminary criminal conviction that determined the reopening of a case (previously concluded - it should be noted - with the *res judicata* court conviction), “when it is a question of complying with the final judgment of the European Court of Human Rights”. This procedural instrument was introduced by the Constitutional Court, due to the inertia of national legislature, in its judgment of April 7, 2011 113, which thus overcame the various attempts made in the past by the Court to apply an instrument already provided for in the Code of Criminal Procedure, deemed suitable to overturn a conviction, in order to comply with the supervening decision of the Court of Human Rights. Our courts found that there was no institution that could, in general, give effect to the judgments of Strasbourg and thus duly introduced one, although there remain problems regarding the compatibility of the current review regulations after the new case was added to those already provided for by 630 Code of Criminal Procedure.

It is certain, however, that the suspect under cross-border investigation could lodge a complaint in Italian courts that the investigations failed to comply with the fundamental rights enshrined in the ECHR.

b) **On persons other than the parties.** More problematic is the effect of ECHR judgments (as regards Italy or any other state party to the Convention) on persons other than the parties to legal proceedings.

Since all judgments can provide the necessary interpretation of the provisions in the ECHR (even if, as a rule, they refer to the case judged by the European Court, which only ascertains whether or not there has been a violation of the Convention in that specific case), there has arisen the question of whether the judgements can

have a bearing on cases already judged by national courts but not judged by the European Court.

This problem has arisen recently in a joint session of the Court of Cassation, which was asked to judge on the effects of the judgment of the Court of Human Rights, Grand Chamber, September 1, 2009, *Scoppola*, which interpreted Article 7 of the ECHR in a completely new way: if a more stringent criminal law is imposed, it is not retroactive but if a judgement is made during proceedings that is more favourable to the accused, it is applicable (a principle also expressed by Article 49 of the Nice Charter). This judgment would mean that life imprisonment is incompatible with Article 7, because of the punishment of thirty years' imprisonment provided for in a supervening discipline in favour of the accused (the aforementioned *Scoppola*), who had asked to proceed with the abbreviated trial procedure (the supervening discipline was the one in force on the day of that request). Consequently, the life sentence pronounced for *Scoppola* in the previous judgment was changed to the thirty years' imprisonment.

The question the Court of Cassation posed was whether this change in the sentence should be exercised in favour of another person sentenced to life imprisonment in the same procedural position as *Scoppola*, despite this person not having gone to the Court of Strasbourg (and the relevant term having expired), and thus not being able to invoke a judgment of the European Court in his or her favour. The Court of Cassation held that, in general, a decision of the Court of Human Rights may also be invoked in other trials but that, in this case, the Strasbourg judgment (in the *Scoppola* case) cannot be applied to other trials because of certain provisions in domestic law which cannot be interpreted in a way that makes it applicable. Therefore, it ruled that the Constitutional Court would have to decide on the constitutionality of these provisions (Section a, April 19, 2012 n.34472, *Ercolano*). The Constitutional Court has recently discussed the issue and we are awaiting its decision.

Also in 2012, the joint session of the Court had to decide on the effects on other trials of the judgment of the Court of Human Rights of 10 April 2012, *Lorenzetti c. Italy*, which stated that reparation proceedings for wrongful imprisonment should take place in open court rather than chamber proceedings (since the participation of the defender to a non public discussion was not considered sufficient). This European ruling, which clearly goes beyond the actual case and ascertains a violation of "fair trial" originating in the Italian legal system, would lead to this system being superseded, which is not possible through judicial interpretation. So in this case, too, the Court of Cassation had to raise the issue of constitutionality of provisions in the code of procedure that conflict with the ECHR, as interpreted by the aforementioned judgment in the *Lorenzetti* case (Section a., October 18, 2012 n.41694, *Nicosia*). Here, too, we are awaiting the decision of the Constitutional Court.

The two cases presented here show that Italian case law is now taking great care to comply with Article 46 of the ECHR (binding force and execution of Strasbourg court judgments). Compliance with the rights conferred by the Convention and, consequently, the judgments of the Court of Human Rights (as regards their effects, which are direct on the parties and indirect on the internal law system)

may, therefore, be considered as guaranteed by those subject to the cross-border investigations conducted by European bodies (present and future).

This situation is also important from the perspective of a uniform protection of persons subject to cross border investigations, a goal that I think is essential if these investigations are to be extended.

### **THE EFFECTS OF EU LAW. IN PARTICULAR: THE CHARTER OF FUNDAMENTAL RIGHTS.**

The protection of fundamental rights within the European Union has been established not only by the ECHR but also by the prior and extensive case law of the Court of Justice in Luxembourg.

The most significant trend in Europe in recent years is the development of an supranational system, as a general legal system, which places limits on state systems, increasing, and not reducing, guarantees for those within the system it. And the strength of the European system lies precisely in the expansive nature of people's rights.

Within the Union, supranational institutions have acquired a special regulatory role, with Community bodies having the power to enact laws that have a direct effect on national laws; they are now at the centre of the system protection of fundamental rights, and the interpenetration of national and supranational systems is experiencing an unstoppable *crescendo*.

The direct effects of the sources of EU law on national law now constitute the pillars of the European system.

The Charter of Fundamental Rights, having the same legal value as the Treaties of the Union (Article 6 TEU), has strengthened this protection and made the rights themselves "more visible", since they are formulated in a written document.

The 'Community path' taken by our Constitutional Court means that today the judicial review of internal laws is not 'centralised' and only the prerogative of the Constitutional Court, but, in the 'broader' sense, has also been extended to all courts called to give "full and immediate implementation" to Community laws that have a direct effect, and not to apply, in whole or in part, internal laws incompatible with them, after obtaining a preliminary ruling, if necessary, from the Court of justice under article 267 TFEU (formerly Article 234 EC Treaty), ensuring, where possible, consistency of interpretation. There can, therefore, be no doubt that national courts are entitled to verify whether a cross-border investigation carried out by a European body, if recognized as having legal relevance in a domestic trial, has complied with a person's fundamental rights and, therefore, the rights of defence guaranteed in Article 48 of the above Charter. In these circumstances, the applicability of the Charter cannot be questioned, since cross-border investigations are carried out in implementation of EU law, thus within the scope of the Charter itself (Article 51)

The Charter of Fundamental Rights, however, does not specify how the rights of defence must be guaranteed. Thus, it would be desirable to enact Community legislation to introduce common procedural rules, applicable throughout the European Union, which would have a positive impact on the protection of the right of defence, making it more uniform and effective. In this regard, Union authorities

have acted by approving Directive 2010/64/EU on the right to interpretation and translation and Directive 2012/13/EU on the right to information in criminal proceedings.

In the recommendation of the European Parliament to the Council on the development of an area of EU criminal justice (P6\_TA-PROV (2009) 0386), the European Parliament emphasized the need to complete the implementation of the principle of mutual recognition, accompanied by the adoption of a uniform set of procedural guarantees and safeguards in criminal proceedings, based on the principle of the presumption of innocence, such as the right to a “Letter of Rights”, the right to legal assistance, free of charge where necessary, and even before the trial, the right to adduce evidence, the right to be informed in a language understood by the suspect/defendant, the nature of and/or the reasons for the claims and/or the basis for suspicion, the right of access to all relevant documents in a language that the suspect/defendant understands, the right to an interpreter, the right to a hearing and effective and affordable appeal mechanisms.

The provision of these procedural guarantees and safeguards must also apply to cross-border investigations.

At present, pending broad-ranging uniform European Union regulations on this matter, national protection of the right of defence in cross-border investigations is to be seen in relation to “if” and “how” the results of these investigations (which today are of an administrative nature) are used in criminal proceedings or in trials that involve the application of an administrative penalty.

There are no Court of Cassation precedents about the utilization of investigations conducted by OLAF. However, the Court of Criminal Cassation was of the opinion that the provisions of the code of procedure on the non usability of the acts undertaken for rogatory letters abroad (Article 729 Code of Criminal Procedure) do not apply in the case of acquisition of information emerging from foreign criminal proceedings, spontaneously and independently offered to Italian authorities by the foreign authorities. And this has been stated with reference to acts of an administrative nature transmitted by a foreign police force (Court of Cassation February 20, 2009 n.11118, rv.243429, with numerous analogous precedents). The same principle, I believe, can be applied to acts of administrative investigations carried out by OLAF.

# A few notes on the theory of counter-limits, the European Public Prosecutor's Office, the Charter of Fundamental Rights and the European Convention on Human Rights, and the Area of Freedom, Security and Justice

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*The author carries out an in-depth analysis on the theory of counter-limits. Recalling the recent Michaud case at the Strasbourg Court, he reflects on the relationship between the ECHR and the EU, and the principle of equivalence in the protection of fundamental rights. Before going on to address the issues involved in the establishment of the European Public Prosecutor's Office, the author focuses on the relationship between OLAF and fundamental rights and the review of actions conducted by this office. The author is in favour of the establishment of an ad hoc European tribunal for the purposes of reviewing investigations undertaken by the European Public Prosecutor's Office.*

The English term “*discussant*” could be used to describe the Socratic role I have been assigned here today, one that promotes “dialogue” or, if you wish, a “Socratic mode of enquiry.” It is a role that is well suited to the topic on the agenda today. However, I shall be speaking in a personal capacity and not as a European judge.

I shall start first by answering a question outside the planned scheme of my speech, the one raised by President Elena Paciotti and Professor Zagrebelsky about the so-called theory of counter limits. Following this, I shall be making a few observations, as I was asked, on the role assigned by the Lisbon Treaty to the future European Public Prosecutor's Office, whose functions are at the heart of today's institutional and doctrinal debate on the area of freedom, security and justice.

With regard to the first point, it must be said that the effects of the theory of counter-limits depend on whether we are talking of the European Convention on Human Rights (ECHR) or European Union legislation and the laws adopted by EU institutions in the exercise of their competences.

As for the ECHR, it should be remembered that it is a typical act of international treaty law. It does not involve any transfer of sovereignty to supranational institutions which would then give rise to a legal system distinct from that of each of the

signatory states. The rules of the Rome Convention, which in many cases are substantially similar to those already existing in the legal systems of member states, are in fact “external” (because they have the character of treaty law), and thus “naturally subsidiary” to the latter, because they operate only in addition to domestic rules and only in cases where the latter do not already ensure appropriate protection. Such being the characteristics of ECHR rules, it follows that they cannot have the effect (first counter-limit) of rendering inoperative *ipso jure* national rules that might be incompatible with them, which the national court is obliged to apply, unless the court questions the constitutionality (second counter-limit) of the national rule before the Constitutional Court.

The situation is different for the rules of European Union institutions.

First, it should be said that the European Union, as also the communities that preceded it, forms a “true” legal system. Because of its politico-institutional origins and aims, it was not conceived as a “regulatory area” external to its member states and whose rules should be added to the pre-existing legislation of the latter, but as an independent legal system which is also common to the founding member states. It is a system, therefore, which is intended to become increasingly more “integrated” into the latter, in the context of a new and progressive division of legislative, judicial and administrative competences, with respect to which the legal rules of one (the EU system) prevail over those of the jurisdictions within it (member states). These rules derive from the European Union system, not treaty laws, such as those of the ECHR. In addition to having primacy (as for the principle of “Primauté” of EU law see the *Costa/Enel* judgment)<sup>1</sup>, “Community” laws also confer subjective rights and obligations, in matters under the Union’s competence, because they part of the juridical heritage of the citizens of the member states and must in any event be safeguarded by national courts (for the principle of “*direct effect*” of EU law, see *Van Gend & Loos* judgement), the only constraint being, if any, a preliminary ruling of the Court of Justice.

Thus, the application of the theory of counter-limits to this new jurisdictional context (we could say “greater integration through gradual transfer of sovereignty”) is more of a theoretical exercise, or a statement that is “counter to sense,” especially after the entry into force of the Charter of Fundamental Rights, whose civil rights guarantees are directly binding on all EU institutions, whether their competences be political, legislative, administrative or judicial.

Indeed, from the moment member states cede part of their sovereign powers and give the Union new legislative or government responsibilities (or strengthen

<sup>1</sup> Of course, it could be argued that, after the Treaty of Lisbon, Article 48, § 2, TEU includes a new, “reduction”, clause, according to which proposals for the amendment of the Treaties may “serve either to increase or to reduce the competences conferred on the Union”. Apart from the fact that in my opinion the clause has a mainly “political” value, I think, in substance, all it means is that it gives member states the legal security *erga omnes*, as provided by a treaty clause defining the division of powers between different jurisdictions, that they can get back the competences which, after the EU’s objectives have been fulfilled, are no longer necessary at European level. This understanding of the “reduction clause” is also supported by the words in Article 2, TFEU, concerning the competences of the Union, and in particular by the clause in paragraph 2, concerning the ‘sharing’ of competences, which states that “Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its own”. The quoted and decisive opinion expressed in the *Costa/Enel* judgment, therefore is still topical and is fully shared, in the sense that the limitation of the sovereign rights of Member States is final as long as the Union’s objectives have yet to be realized.

those it already had) – competences which Union institutions exercise with at least the same *quantum* of sovereignty that member states had before they were transferred - a precise limit is created to the independent actions of individual member states (see the *Costa/Enel* judgment, which specifically “make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity”. In fact, “the law stemming from the treaty, an independent source of law, could not because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question”. If this is so, then any “counter-limits” that affect European Union rules cannot be reintroduced later at national level through case law formulated only in some member states, because the competences in question have been transferred “definitively” to the Union and its institutions – as the Court pointed out again in the *Costa/Enel* judgment<sup>1</sup>. Thus, we cannot, so to speak, “regret” having made these concessions and try to subsequently place national jurisdictional controls on acts of a system of this kind, precisely because, to quote Dante,

“né pentere e voler insieme puossi per la contraddizion che nol consente”.

(nor can we admit the possibility of repenting a thing at the same time it is willed, for the two acts are contradictory)

It is evident that precisely because EU rules have primacy over domestic rules and can have a direct effect on them, they are not exempt (and never have been) from judicial review if their legality is called into question. If EU institutions do not comply with certain fundamental rules (for example, legislating, to use a neologism, “*ultra cedata*” or in violation of fundamental principles) in the exercise of the powers ceded to them, they are not *legibus solutae*. Indeed, it was precisely for this purpose that the founding states introduced what perhaps most strongly distinguished the Community from contemporary forms of intergovernmental organizations and created the Court of Justice, a court that is functional precisely to the new legal setup, since it ensures, *erga omnes*, that “in the interpretation and application of the Treaties the law is observed” (Article 19 TEU).

Of course, by this I do not mean that the treaties rule out any possible intervention by the courts of this or that member state in the application of Union law. This possibility, however, does not operate as a “counter-limit” to the effectiveness of European rules but rather as an “added value” in the activities to check the validity (or compatibility) of these rules, activities entrusted primarily to the Court of Justice. Provided that the Court has been duly given this function, either directly (through an appeal lodged by those entitled to do so, such as member states), or through the mechanism of a preliminary ruling of a national court (constitutional court included) about the application of a European rule whose validity has been called into question. This “value” is a little less “added”, however, after the recognition of the EU Charter of Fundamental Rights, because of the directly binding nature of the provisions in the Charter on all EU institutions, authorities, offices and agencies.

I’d like to end this first “Socratic observation” by pointing out that under the current Article 4 of the Treaty of Lisbon, “*The Union shall respect the equality of*



member states before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional". Now, when EU member states, which are both the authors and the "masters" of the European Treaties, introduced this new provision, they expressly imposed an obligation on the Union to respect the political and "constitutional" identity of each member state belonging to it. It is an obligation that the Court of Justice must obviously observe and make sure is observed.

I now come to the issue of the European Public Prosecutor's Office. I think that this office, as least as regards the areas of EU law with which I am most familiar, is an organ that is (A) "European", (B) jurisdictional in nature (thus independent of national legislative constraints, in the sense that its action concerns only the EU system), and that configured by the Treaty as (C) the only European instrument that can "investigate, prosecute and bring to judgment" before competent national courts "the authors of offences against the Union's financial interests, as defined in the Regulation" establishing this office (Article 86 TFEU)<sup>2</sup>.

Having said this, it is a widely held view in doctrine, especially as regards criminal law, that in order to proceed with the establishment of a European Public Prosecutor's Office there must be a need for this institution and that until such a need has been proven (examined mainly in terms of the principle of subsidiarity, and which is primarily the responsibility of the Commission and national parliaments), it is not worth speaking of such a body. However that may be, the Union does not have, again according to doctrine, direct competence in penal matters, which is exercised, like national legislations, in compliance with the minimum requirements of democratic legitimacy necessary to adopt punitive rules, beginning with the cardinal principle of any system of criminal law: *nullum crimen nulla poena sine lege*. Consequently, according to this school of thought, the European Public Prosecutor's Office could only "inter-act" with the various prosecutors of member states, since the Union cannot directly define European crimes nor adopt punitive rules. However, there is the objection that if, under Article 86 TFEU, it is the EU's responsibility to tackle the said criminal phenomena, then it must be admitted that the responsibility for everything that relates to the exercise of any penal action of a European (or "supra-national") dimension falls within the powers of the Union. In such a division of powers, national investigative and police authorities should then act and intervene only in the context of an executive collaborative relationship (see Article 4, § 3 TEU) with the European Public Prosecutor's Office, which has exclusive responsibility for European criminal prosecution, and not in a context of delegated European powers of investigation and inquiry, since *delegata potestas non potest delegari*.

I believe, however, there is perhaps a fundamental misunderstanding in the

<sup>2</sup> Article 86 TFEU states: « 1. 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. The Council shall act unanimously after obtaining the consent of the European Parliament. [...] 2. The European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests, as determined by the regulation provided for in paragraph 1. It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences".

way this issue is approached.

The European Public Prosecutor's Office is not an EU objective but an EU means (according to the Treaty of Lisbon, the only means) to combat European financial criminality, "European crimes" affecting the EU's financial interests, crimes which will have to be determined by the regulation referred to in Article 86 § 2 TFEU (and not on the basis of Article 325, § 4 TFEU, which instead provides for the adoption of "measures" for the prevention of fraud to the detriment of financial interests) and which because of their dimension, organization and gravity cannot obviously coincide, literally, with those already existing at national level.

In Latin, the European Public Prosecutor's Office would be described as a judicial body *certus an*, as regards its configuration, role and powers defined in Article 86 TFEU, but *incertus quando*, as regards the exact time it comes into being, which depends on the European institutions adopting its operational regulation.

As things stand, then, the decision to create this particular authority, and not others, no longer appears to be questionable.

The fact that Article 86 TFEU states that to fight European crime the Council "may establish a European Public Prosecutor's Office from Eurojust" (which was set up in February 2002, and which, under Article 85 TFEU, does not have any independent prosecution competences but is designed to support and strengthen coordination and cooperation among different national investigation authorities) does not mean that the Council enjoys full discretionary power in this regard, being subject in any event to verification by the European Parliament and the Court of Auditors. The competences of this court include providing assistance to the Parliament and the Council precisely when the said institutions adopt, in accordance with Article 325, § 4 TFEU, "the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union".

In terms of European legislative process, this "possibility" means, if anything, that from the moment it is proved that the Union's financial interests are actually affected by cross-border fraud (something that has been ascertained for some time), the European Commission, as the institution entrusted by Article 17 TEU with the task of presenting any EU legislative proposals, will have to submit the draft regulation pursuant to Article 86 TFEU to the Council, which will then continue the corresponding legislative process with the adoption of the planned regulation, after approval by Parliament.

I now turn to a few brief observations on three issues. The first concerns the European Convention on Human Rights and the Charter of Fundamental Rights: when the Strasbourg Court tells off a supreme national court for failing to comply with its obligation to refer matters to the Court of Luxembourg. The second: OLAF and fundamental rights. Third: the European Prosecutor's Office and the area of freedom, security and justice.

The ECHR and the European Union. I would like to look at a recent Court of Strasbourg judgement of 6 December 2012, which became final on March 6, 2013: Case 12323/11, "*Michaud / France*." Michaud, a lawyer and plaintiff in the case, contested a French legislative measure for breaching Article 8 ECHR (respect for private and family life, home and correspondence) since it obliged lawyers to report any dubious financial transactions of their clients to competent national or

European authorities (e.g. OLAF), because of the suspicion of money laundering. This provision, however, was adopted by France in implementation of European Directive No. 60 of 2005 on the prevention of the use of the financial system for the purpose of laundering the proceeds of criminal activity and terrorist financing. In his appeal to the Conseil d'État, Michaud asked this supreme administrative court to refer the matter to the Court of Justice, to ascertain if the said French rule was compatible with EU rules, and in particular with the Charter of Fundamental rights, which, pursuant to Article 6 TFEU, had acquired the same force of law as EU treaties.

The French Council of State rejected the appeal, considering that while the provision in question was theoretically in contrast with a lawyer's obligations towards professional secrecy, it was justified by the evidently more important needs of law and order, particularly as concerns the prevention of cross-border crimes, such as money laundering (now one of the "European crimes" specifically provided for in Article 83 TFEU<sup>3</sup>). The Conseil d'Etat, however, did not refer the matter to the Court of Justice, despite the obligation to do so as a court of last instance (Article 267 TFEU).

Michaud then appealed to the Strasbourg Court, which confirmed the verdict of the French Council of State as regards the compatibility of French rule with the parameters of the ECHR, citing the same law and order considerations invoked by the latter. In reaching this conclusion, though, the Court looked at the question of whether the so-called "presumption of equivalent protection" between ECHR rules and corresponding EU rules was applicable in this case (see judgment *Bosphorus v Ireland* 30/06/2005, Case 45036/98). In this regard, not being a regulation, as in the *Bosphorus* case, but a European Directive (i.e. an act which is binding on member states as an end to be achieved but which allows them to choose the best means of achieving it), the Court of Strasbourg observed, first, that since the Court of Justice had not verified, directly or indirectly, the compatibility of the French provision with EU law (as had happened in the *Bosphorus* case, in which the Supreme Court of Ireland had instead referred the matter to the Court of Justice), the above-mentioned presumption of equivalence could not apply and that it was, therefore, necessary to verify whether the French rule (enacted in implementation of a directive which, unlike a regulation, leaves member states a certain margin of legislative discretion) was or was not compatible with the standards of the Convention. It concluded its review affirmatively, stating that the said provision was compatible with Article 8 ECHR.

The European Court of Human Rights, however, strongly criticised the French Council of State for failing to fulfil its obligation of referring the matter to the Court of Justice. Indeed, from the perspective of the ECHR, the "rebellious" decision of

<sup>3</sup> Article 83 TFEU states: "1. The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with 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 and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime".

the Conseil d'État to not consult the Court of Luxembourg effectively deprives individuals, who, as pointed out in the Court in Strasbourg judgment, have no access to the EU Court comparable to the one guaranteed to them by Article 34 ECHR in appealing to the Court of Human Rights, of the most effective methods of community control over the effective protection of their fundamental EU rights, the right to a preliminary ruling.

However - and this is the point - the compatibility of the said French provision, as established by the Court of Strasbourg, operates only with reference to the parameters of the Rome Convention and in national legal systems that have acceded to it, and is not, instead, also automatically valid in the European Union system, since the latter is not in fact part of the Convention of Rome.

In short, a case that is by no means straightforward, in which a national supreme court, perhaps in order to act quickly and well, decided not to meet its Community obligations to consult the Court of Luxembourg over a matter that was new and decisive to resolve a Community dispute, thus obliging the Strasbourg Court, the court of last instance for fundamental rights, to criticize the anti-community behaviour of a national supreme court.

As regards this right, the "Michaud" case underlines once again that in cases of doubt about the scope or validity of a European rule, which can affect the outcome of a case brought before them, the courts of member states, as Community courts called to protect the subjective rights which EU law guarantees to individuals, should always refer the matter to the Court of Justice (even when they are not required to do so) for a preliminary ruling, especially as regards the protection of a fundamental right under the Charter. Indeed, the sooner the Court of Justice intervenes in a situation similar to that of the "*affaire Michaud*" the sooner all national courts will find out the exact interpretation and scope of a particular European provision, and the sooner a national rule implementing a European directive will be recognized as being fully compatible with Community law. Since the preliminary rulings of the Court are effective *erga omnes*, they will be valid in all the legal systems of member states which, in implementation of the directive, have adopted similar national rules.

On the other hand, one might still "Socratically" ask: what would happen if the court of last instance not only did not refer the matter to the Court of Luxembourg but also passed a judgement infringing one of the fundamental rights of the Charter? Would the judgment of last instance have the authority of a *res judicata* also in the EU legal system? Say, for example, the Court of Justice were to find out about this judgment later (after the matter had been referred to it for a preliminary ruling by a national court dealing with an action against a State for breach of EU law by the court of last instance that pronounced the judgement), and established in this preliminary ruling that the judgment also violated a fundamental right of the Charter (such as the one referred to in Article 47, namely the right of every person to have "*his case examined by a ... independent and impartial tribunal ...*" (impartial also in terms of compliance with Community obligations relating to it, such as referral of the matter to the Luxembourg Court for a preliminary ruling, in the best interests of the party to the dispute when it involves, as pointed out by the ECHR Court in its judgment of the "*Michaud*" case, the protection of a fundamental right

guaranteed by the Charter of the Union), what would its verdict be about regards the authority that the *res judicata* would have in EU law? Would the Court confirm the case law in the Köbler judgement, for which the authority of the *res judicata*, even if contrary to EU law, must be respected and, thus, cannot be subjected to review, but is rather a source of liability for damages of the member state to which the judge belongs? Can money really be the measure of all things, replacing even compliance with a fundamental right which the competent court can protect and enforce?

I shall leave these questions open and move on to the second of my observations: OLAF and Fundamental Rights.

A year ago the Dalli case exploded. Dalli was the Maltese commissioner for health and consumer protection, suspected of having accepted a bribe to influence the legislative reform process of a key directive for companies operating in the manufacture of cigarettes, known as the “Tobacco” Directive. Well, the President of the Commission instructed OLAF to make a detailed report of this affair to ascertain the actual facts behind the press reports. OLAF sent its confidential report not only to the Commission but also, since it concerned a criminal offence, to the Malta Public Prosecutor’s Office, which in turn began an investigation on Mr Dalli. Meanwhile, the British press came into possession of OLAF’s confidential report, which was strongly criticised for violating the fundamental rights of the commissioner, and especially of the defence. Overwhelmed by the suspicions against him and by the turn of the events, Mr. Dalli resigned his post.

I shall not enter into the procedural aspects of the case but as a Socratic “dissutant” I ask myself: who controls OLAF activities?

Currently this role is assigned to a monitoring committee within the Commission, composed of authoritative jurists who, indeed, have already repeatedly highlighted the need to strengthen judicial control, the view being that it should not be simply an internal matter as it is at present but should be external and independent. The above facts seem to confirm the said committee’s reservations and much remains to be done in this area. For example, who will monitor the actions of the future European Prosecutor?

Article 86 TFEU says nothing about this. The current feeling among European stakeholders (the Commission, working groups and other bodies involved in the preparation of the proposal for the Regulation establishing the European Public Prosecutor’s Office, a proposal given as imminent) seems to point towards entrusting this control function to the competent national courts, in accordance with the logic of proximity to the area of the EPPO’s investigations, and perhaps even the logic of subsidiarity.

I note, however, that since EPPO investigations will centre on new ‘European’ criminal typologies, its action cannot fail also to be “European” (thus going beyond the current limit of Article 85 TFEU as concerns Eurojust, which speaks of “prosecution on common bases” in states where the criminal activity took place, and then a type of inter-state prosecution). Thus, it would take place “across the board”, in all the different member states in some way affected by or involved in the criminal activities affecting the financial interests Union.

If this is so, the prospect of obliging the European Public Prosecutor’s Office to

justify the legality of its investigative measures before the courts of all member states where such measures are carried out appears to defeat somewhat the essential requirement of incisiveness and simultaneity of action (the same requirement for OLAF investigations - carried out within the abovementioned limits - and which is under the control of a single non-national body). Hence the alternative of setting up a specific “European” court for the protection and control of all “Europeans” acts of investigation undertaken by the European Public Prosecutor’s Office.

But which court? The Court of Justice, the General Court of the European Union or a new *ad hoc* court? The Court of Justice is a supreme court whose role does not seem to be functional to the control needs in question. The same could be said for the important and heterogeneous competences of the General Court, which has not been designed to deal with litigation that requires rapid response.

To meet these needs it might be best to establish an *ad hoc* court, modelled, for example, on the European Union Civil Service Tribunal, the first and so far the only court to be set up on the basis of Article 257 TFEU. However, since the issue here is the European compatibility of acts of a penal nature which could lead to a decision to refer the perpetrator or perpetrators to a competent national court, the judgments of the said Tribunal should only be appealable directly to the Court of Justice, and not before the General Court of the European Union, as currently required under the Article 257 TFEU, concerning the judgments of specialized courts. This second and definitive control of the Court (i.e. not susceptible to a third “review” as under Article 256 § 2 TFEU), avoids any serious harm being done to the unity or consistency of Union law, especially when it concerns a uniform interpretation of European criminal rules regarding offences subject to the prior action of the European Public Prosecutor’s Office, or those governing the operations of that body, or, finally, those in the Charter of Fundamental Rights of the Union.

In functional-practical terms, then, I wonder if it might be better not to establish a new judicial body immediately, on establishing the European Public Prosecutor, but to make use, at first, of the present Civil Service Tribunal, including within its jurisdiction the control of the validity of decisions taken by the Office, adapting them if need be. In this regard, the essential changes (which in themselves are minimal) to be made to the current Article 257 TFEU do not appear to be an insurmountable obstacle.

Finally, my last observation regards the area of Freedom, Security and Justice. If it is implemented effectively, it could become a potent factor for the integration of member states and the European Union and, therefore, also a factor for changes in the physiognomy and role of the latter, a little like what happened with the tremendous impetus given to the progress of the European Economic Community by the implementation of the Single Market.

We could, of course, say that where there is a will there’s a way. However, since the Union is suffering from a severe economic crisis that has unfortunately given rise to forms of governance of the stability of the euro zone that are exclusively intergovernmental in origin and content, this does not seem to be the right time for the gradual implementation of this truly European area.

Still, we cannot fail to see that a single area of security and justice (which, it must be stressed, requires the adoption of “appropriate measures for the preven-

tion of crime and the fight against it" - see Article 3 TEU) is a goal that is directly functional and complementary to the realization of the other, equally fundamental objective of the Union: the stability of the euro zone.

The stability of the euro zone would indeed become a chimera if uncontrolled financial crime were allowed to roam free within it. Now, having chosen to safeguard the stability of the euro zone with a policy that relies exclusively on inter-governmental tools and then go on to observe that in this same euro-land all kinds of criminal acts against the financial interests of the European Union and against its single currency go unpunished and cannot be punished, does not, for sure, seem to be a choice inspired by a Community methodology and logic. These inter-governmental tools include the powerful European Stability Mechanism, which is also a "non-EU" tool, in the sense that it does not derive from a "fourth pillar" type structure, i.e. one within the Community framework of the EU legal system. The European Stability Mechanism - created with the intergovernmental agreement concluded between euro zone member states and which, in spite of the adjective, is seen as an "international" financial institution, is in fact not tied to any decision making involvement of the Commission or the European Central Bank.

If it is not decided to establish the European Public Prosecutor's Office, or if its effectiveness is hampered for reasons of vital interest of national sovereignty in the sphere of criminal procedure, for fear that tomorrow this office could effectively and independently perform its duty to protect the financial interests of the EU and its currency, we shall be standing still and inert in the fight against organized crime at EU level. This type of crime is advancing with impunity in a single and open market, where the only existing borders are paradoxically those that are invisible, though not for that easily penetrable. The law of each member state places obstacles in the way of its own investigative authorities, which are obliged, for reasons of territorial sovereignty, to fight against this overwhelming criminality only inside the borders of their own country, or at most to make use of the coordination services provided by Eurojust. Not an ideal situation.

Nevertheless, allow me to end, as a "Socratic discussant", reminding you of what was said more than sixty years ago by Jean Monnet to those who had serious doubts about the European project, which at that time was considered too integrationist and supranational "Those who do not want to start anything because they are not sure that things will go exactly as they had planned are condemning themselves to remain immobile. Nobody can say today what will be the institutional framework of Europe tomorrow because the future changes, which will be fostered by today's changes, are unpredictable".

Monnet, Schuman, De Gasperi and Adenauer went resolutely forward along the Community road and the "change" that ensued proved they were right, and this is still true today.

# OLAF: between investigative potential and regulatory limits (1999-2013)

*Check against delivery*

## **Alberto Perduca**

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*After having highlighted the transformations which have characterized European judicial cooperation since the 1990s, the author focuses on the role played by the European Anti-Fraud Office (OLAF) and maintains that, as a Community investigative authority, its potential has yet to be fully realized. The author then highlights the lack of a regulatory framework or a minimum set of rules.*

Since the 1990s, European judicial cooperation has experienced significant changes. Today, prosecutors and judges who need to search for evidence, people and assets abroad work under much better conditions than their predecessors just 15-20 years ago.

Firstly, direct relations between magistrates have been fostered by legislative developments and practices. Less time is needed to establish cooperation and, more importantly, judges and prosecutors have started to free themselves of ministerial tutelage and are more aware of the importance of operational dialogue between the requesting and requested judicial authorities. This dialogue, in part informal, involves exchanges of information and agreements on investigative initiatives of common interest, which precede and follow the forwarding of the official letters of request.

Moreover, within the European Union, prosecutors and judges dealing with transnational cases can benefit from the assistance provided by liaison magistrates, the European judicial network and Eurojust. These are support organizations established in quick succession in the second half of the 1990s, which have different structures and vocations. Whereas liaison magistrates are mostly concerned with bilateral assistance, the European judicial network and especially Eurojust focus on cases involving the judicial authorities of more than one Member State. In this regard, the Treaty of Lisbon made Eurojust responsible for starting criminal investigations and even promoting the start of criminal proceedings. Of course, we must not forget its role as an incubator of the European Public Prosecutor.

At present, there are so many possibilities that the magistrates *de terrain* do not always find it easy to understand which organization they should actually turn to. What is certain is that the simultaneous presence of three judicial support bodies amply illustrates that the project for a European area of justice is far from having been completed or rationalised.



That this reality is still fragmented and in flux is further confirmed by the presence of a fourth actor, in addition to the triad of liaison prosecutors, European judicial network and Eurojust, one which is supranational, has marked characteristics of its own, and works closely with (and assists) the justice system - the European Anti-Fraud Office (OLAF).

Olaf is the fruit of a very intense period of institutional activity which started in the mid-1990s. There was a feeling that community finances were a fundamental asset for European integration and that, as such, should be safeguarded effectively at both criminal and administrative levels. This period saw the approval, in just a few years, of important documents such as: the Convention and additional Protocols for the protection of EU finances against crime; the Regulation providing for administrative sanctions to be applied to irregularities prejudicial to the financial interests of the Community; the Regulation which give the European Commission services the power to inspect operators suspected of fraud and irregularities to the detriment of EU finances.

It was in this period, then, that OLAF was created, accelerated by the institutional crisis that led to the resignation of the entire European Commission in 1999. The European Anti-Fraud Office has investigative authority over two categories of persons, physical and legal, suspected of irregularities, fraud and corruption to the detriment of Community finances (external investigations), and over officials and representatives of Community institutions suspected of omissions and abuses prejudicial to Community finances (internal investigations).

OLAF's 14 years of operational experience shows that, for several reasons, the decision to distinguish between internal and external investigations was not a happy one. The first problem is the fact the rules governing the two types of investigation are not completely homogeneous. Then, it is not uncommon to find cases in which both *outsiders* and *insiders* are involved in the same fraud. Finally, this distinction does not foster collaboration between the Office and European institutions. It is not a mystery that OLAF's internal investigations arouse fear and suspicion among Community bureaucracies. It is no coincidence that the greatest friction between the Office and the institutions occur when their officials or representatives, especially if high-ranking, are involved in internal investigations, above all when the outcomes are brought to the attention of the national criminal justice authorities.

From the point of view of national prosecutors and judges dealing with cases of transnational community fraud, the establishment of OLAF was undoubtedly of considerable interest. In fact, it would not have escaped their attention that OLAF, unlike the abovementioned judicial bodies and Europol itself, is authorized to carry out investigations throughout the European Union, and in third countries on the basis of *ad hoc* clauses contained in cooperation agreements with the European Union. Such is the strength and uniqueness of the Office. On the other hand, Olaf has neither a statute nor powers of *law enforcement*. These limits are by no means negligible and can be explained by the all-too-well known resistance of Member States to cede parts of their sovereignty, in this case for the establishment of a Eu-

ropean Federal Police. A large amount of the evidence required by prosecutors and national judges dealing with cases of Community fraud is of a documentary nature or otherwise accessible without the need for coercive power. The real problem is how to get it in the countries where it is to be found. Olaf can acquire or otherwise obtain this evidence. And this is what counts most for magistrates.

Slowly, national judicial authorities began to realise that OLAF, as a specialized investigative body *without frontiers* (in Europe and in third countries), could help them acquire certain evidence overseas more quickly and efficiently than the usual channels of international legal assistance. Moreover, this expectation was supported by at least two of the regulations governing OLAF's investigative activities. One provides for the transmission of information to the judicial authorities on facts likely to have criminal implications. The other confers on the office's final investigation reports the quality of evidence, also criminal evidence, on a par with the homologous reports of national inspection services. Of course, the acceptance of Olaf information as evidence in individual criminal procedural law systems is not homogeneous: in some it is used as a mere investigative starting point, in others for the adoption of intrusive measures (such as pre-trial detention and wiretapping) and in some even for decisions on the guilt/innocence of the accused.

However, the potentialities of Olaf as an investigative body of the EU, independent but not separate from national judicial systems, do not easily translate into reality. Among the many causes of this situation is its structural shortcomings, which deserve some mention. They are not the only ones but certainly the most important.

First, OLAF is governed by a discipline that does not live up to its ambitious mandate, namely *"to step up the fight against fraud, corruption and any other activity detrimental to financial interests of the EU"*. For an investigating body to act effectively, especially against phenomena that are often criminal in nature, it needs some basic juridical rules, *erga omnes* obligations, specifying which investigations are to be carried out and under what conditions, which faculties and rights are to be granted to interested parties and to third parties, what sanctions apply for acts carried out in breach of the rules, and which bodies are responsible for monitoring the legality of investigations.

One example will suffice to highlight the insufficiency of OLAF's regulatory discipline. The few regulations that govern OLAF activities do not mention the possibility, in external investigations, of hearing witnesses. Obviously, it is difficult to conceive of an investigation without getting information from the people who have it. For this reason OLAF decided not give up this investigative tool. The risk, though, is that this choice, which can be placed in the realms of praetorian law, is contested.

But the existence of an appropriate legal basis is not only the *conditio sine qua non* to ensure the legitimacy and effectiveness of OLAF action. Regulations are all the more necessary in an operational body that includes officials from all the countries of the European Union, with very different types of professionalism, legal education and practices. In this situation, common rules are crucial for investigative harmonization and cohesion, as well as the construction of the identity of the Office.

Now, if the lack of a minimum set of rules in 1999 can be explained by the urgency with which OLAF was established, the many years that have passed since then make the gaps of its regulatory system unjustifiable. Today, over 14 years after the establishment of OLAF, we seem to be closer to a modification of its original regulations. However, the costs produced by the delays of Community lawmakers are neither few nor minor.

A first negative effect is the juridical uncertainty that accompanies investigative activity. This uncertainty, which does little to add credibility to the Office, also produces legal disputes that are far from marginal, and which are sometimes won by those who bring them before Community courts, especially by officials and representatives of institutions who consider themselves to have been damaged by the way in which investigations are conducted against them. Many of these disputes concern OLAF's decisions to forward final reports to the judicial authorities, containing information on facts subject to criminal implications. What is questioned is the application of the rules, which, in principle, constitute one of the Office's great strengths and its uniqueness.

OLAF tries to compensate for the lack of juridical rules with the adoption of internal rules and *soft law* instruments, such as Memoranda of Understanding with various institutions. However, what inevitably prevails is prudence, dictated by fear of mistakes and abuse. In view of the regulatory vacuum, the chance of making mistakes is high. To limit this, internal controls on the investigations, from start to finish, have been stepped up. The problem is that these controls risk both producing a lot of extra bureaucracy and absorbing substantial resources. They may blur the idea that investigations are also a matter of research and intellectual challenge and not only the observance of procedures. This idea of research and challenge can only be reinforced by the office being granted the credit that only lawmakers can give.

A third negative effect is that, over the years, not even OLAF's Supervisory Committee has escaped the dynamics of increasing controls. When first set up, thanks to the high calibre of many of its members, this body was very attentive to the perimeter of its prerogatives. But later, attention gradually started to focus on getting more and more information about the investigations. The rationale behind this was to make up, in this way, for the lack of rules. But in doing so the role of the Committee ended up changing: from guaranteeing the independence of the Office and monitoring its overall effectiveness and legality to being a supervisory body *tout court* of individual inquiries.

Returning to the standpoint of the national prosecutors and judges dealing with cases of transnational fraud in the EU, it is quite possible that, by virtue of the above, their expectations of OLAF will be disappointed. After all, this would happen in any investigation service, national or Community, forced to operate over many years without an appropriate regulatory basis, slowed down by too many internal control procedures and, moreover, continually asked to account for the re-

sults of their investigations to bodies other than the prosecutors and judges that are assessing the results of these investigations in the course of criminal proceedings that may still be confidential.

And with all the public accusations that have regularly been levelled at OLAF over the years, accused of multiple and serious violations in the conduct of investigations on which national judicial authorities had yet to rule, it would not be surprising if the trust of prosecutors and judges in the Office were to be further eroded.

Which would be bad news for everyone. For European institutions that seem to be incapable of fully exploiting the uniqueness and potential of OLAF. For national justices systems which come to be deprived of a credible and effective EU-wide investigative service.

We are on the eve of a concrete proposal for the establishment of the European Public Prosecutor. Since the early 1990s, this idea has undergone reflection, discussion and proposals. At that time many believed in OLAF, convinced that in the course of its activities this Office could demonstrate the need for an EU investigation service, thus in some ways preparing the ground and promoting the establishment of the European Public Prosecutor's Office. Today, the risk is that the EPPO will be established not on the success but on the failure of OLAF.

## III session



Relationship between  
OLAF, the future EPPO,  
the other European  
bodies and  
the national judicial  
authorities



# Establishment of the European Public Prosecutor's Office

*Check against delivery*

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*After highlighting the reasons behind the need to establish a European Public Prosecutor's Office (EPPO), the author focuses on aspects that will characterize the future authority (independence, exclusive competence in the protection of EU financial interests, structure, functions, guarantees, impact on national authorities and EU institutions), and the as yet unpublished European Commission proposal for a Regulation.*

## INTRODUCTION

This has been a long reflection, which is coming to an end. Very soon, the Commission will make a joint proposal on the establishment of the European Public Prosecutor (EPPO) in the form of a regulation, accompanied by a proposal to reform Eurojust. This initiative follows an earlier announcement by the President of the Commission, Mr. Barroso, concerning the Commission's work plan in the rule of law area that the Commission would make such a proposal in the course of 2013. The emphasis on the establishment of the European Public Prosecutor's Office in accordance with the principle of the rule of law is significant.

## OBJECTIVE NECESSITY FOR THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE

The proposal on the establishment of the European Public Prosecutor's Office is an important political decision for the Commission. The Treaty contains the possibility to establish the European Public Prosecutor's Office, not an obligation. The need to set up such a European prosecution office is demonstrated by the Impact Assessment which is going to be made public very soon. It is evident that this may not be enough to convince everybody. As the Commission goes ahead with the proposal, it will have to engage in an intensive discussion with stakeholders by providing further arguments in support of its proposal, which comes at a time when the impact of the financial crisis is still being felt. In a financial crisis, when every penny counts, the Union needed to act. Our experience is that a lot of Union money gets lost every year. According to OLAF statistics, fraudulent irregularities amount to between € 400-600 million per year. Estimates provided in the Impact Assessment put this figure much higher, between € 3-5 billion per year. This figure has to be assessed against the background of the annual EU budget, which is roughly € 140 billion, meaning that about 3-4% of Union's annual budget goes squandered every year.

The European Public Prosecutor's Office should not only be viewed as a tool aimed at protecting better the EU's finances. It should become a milestone in the creation of a genuine area of freedom, security and justice – an objective set out

in the Treaty of Lisbon. If we succeeded with the project of the European Public Prosecutor's Office, the EU would reach another level of European integration. After the customs and, soon, the banking union, the EU would be coming closer to something resembling a judicial union. And in that area the European Public Prosecutor's Office will be an essential building block.

## KEY ELEMENTS OF EUROPEAN PUBLIC PROSECUTOR'S OFFICE PROPOSAL

The Commission's proposal on European Public Prosecutor's Office is built around a few key concepts, which I will seek to explain. In addition, it contains innovative ideas as concerns the relationship between the European Public Prosecutor's Office and the national authorities as well as and the link between European Public Prosecutor's Office and other EU bodies. To begin, the key concepts will be outlined.

### INDEPENDENCE

Ever since the idea was put forward by academics, there have been calls to make the European Public Prosecutor's Office independent, knowing that national constitutional law does not always guarantee independence of the prosecution system. The European Court of Human Rights indeed has constantly reminded that the prosecutors need such independence in investigations. The Commission's proposal shares the same belief by providing that the European Public Prosecutor's Office should be fully independent and that its independence should be construed legally and institutionally so that no EU or national institution can interfere with its investigations and prosecutions.

Perhaps one point that clearly demonstrates why it should be fully independent is that the European Public Prosecutor's Office competence will not cover "ordinary" financial investigations. Its competence will cover investigations into fraud and related financial offences, such as corruption and money laundering. Recent cases at national and at EU level have also demonstrated the need to have a fully independent prosecution office, which only take instructions from its head. Therefore, according to the proposal, investigations will be conducted under the authority of the head of the European Public Prosecutor's Office, who will be answerable and accountable only to the EU institutions. The Commission will propose that the European Public Prosecutor, the head of this office, be appointed by the Council with the consent of the European Parliament; and that he or she be responsible for everything that happens in that office. Such appointment procedure comes with a certain number of consequences, including the possibility to remove the head of the office in case he or she no longer fulfills the criteria for the appointment or he or she has committed serious misconduct.

### COMPETENCE

The Commission's proposal foresees that the European Public Prosecutor's Office will have exclusive competence over criminal "PIF offences". Its competence would be exclusive in the sense that the office will cover not only "cross-border" cases, but also "national" PIF cases. In other words, the European Public Prosecutor's Office will take over the responsibility which is now exercised by national



prosecution and law-enforcement authorities, to investigate and prosecute PIF offences, and it will aggregate that competence at the level of an EU office. PIF offences will be defined by a Directive, the so-called PIF directive, currently under negotiation in the Council and Parliament. The Council has just reached agreement (“general approach”) last week on the proposed directive, and we expect that the Parliament will, hopefully, start discussions on the proposed directive. Beyond that, the European Public Prosecutor’s Office will have an “ancillary” competence (accessory to its PIF competence), meaning that, subject of certain conditions, the European Public Prosecutor’s Office should be authorized to investigate also connected offences in “hybrid” situations, i.e. where a PIF offence is accompanied by a non-PIF offence. There will be several important conditions for triggering the exercise of ancillary competence: 1) the facts are identical; 2) these facts are inextricably linked; 3) the PIF element is preponderant (for example: if it’s a co-financed project, the EU subsidy is much larger than the national subsidy); 4) the national authorities waive their competence. In other words, ancillary competence is dependent on a consensus between the national authorities and the European Public Prosecutor’s Office that the latter takes over the investigation of the connected offence. If any of these conditions is not fulfilled, the case must go to national authorities. This is seen as a practical solution to the situation when PIF offences are indeed connected with other (non-PIF) elements, such as national fraud offence or a tax offence etc.

## STRUCTURE

The European Commission will propose to set up the European Public Prosecutor’s Office as a decentralized office. This doesn’t mean that everything should be done on the ground by local law enforcement authorities and prosecutors. The proposal foresees that the European Public Prosecutor’s Office will be a European office with a structure consisting of a central unit and local offices throughout the member States. Most decisions will be taken on the ground by the European Delegated Prosecutors, who will be the incarnation of the European Public Prosecutor’s Office in the member States, and who will act under the authority of the European Public Prosecutor. For example, the initiation of an investigation will be an autonomous decision of the European Delegated Prosecutors. The Commission believes that it is important to preserve the local connection, as crucial information often will come from national law enforcement authorities during investigations into a fraud-ring or a VAT Carousel. These offences may reveal a PIF element in the case. Thus, information triggering an investigation by the European Public Prosecutor’s Office is likely to come in most cases from national law enforcement authorities. In such situations the European Delegated Prosecutor should have the power to initiate investigations on behalf of the European Public Prosecutor.

In order to ensure efficiency of the European Public Prosecutor’s Office, there will have to be close coordination of activities with national authorities. Indeed, the European Public Prosecutor’s Office will become a pioneer institution as it will be moving away from the usual model of cooperation to a model of direct enforcement at European level. For this, the European Public Prosecutor’s Office will need certain powers to decide and instruct, as ultimately the European Public Pros-

ecutor must have a say whether the case does or does not deserve to be brought to court; whether indictment must be brought; and on the choice of jurisdiction. The Commission's proposal reserves these decisions to the central structure of the European Public Prosecutor's Office, which will take these decisions in consultation with the European Delegated Prosecutors involved in the case. The philosophy behind this approach is that ultimately the European Public Prosecutors has to bear responsibility for these decisions. The concept deriving from the Treaty is indeed that the European Public Prosecutor shall be responsible for investigating, prosecuting and bringing to judgment these offences. In the Commission's view, responsibility implies that a prosecutorial decision must be taken individually, not collectively.

The EPPO will be an integrated office in the sense that it will integrate all the functions which are involved in a criminal prosecution, from the first act of initiating pre-trial investigation until indictment and pleas in national courts. This approach is in full conformity with the broad powers foreseen by Article 86(2) of the Treaty on the Functioning of the European Union, which provides that 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" and "shall exercise the functions of prosecutor in the competent courts of the Member States". In practical terms, these powers will cover a wide range of prosecutorial and investigative functions, such as investigations, prosecutions, trial pleas, etc. The Commission's proposal will also contain a provision authorising the European Public Prosecutor's Office to conclude transactions, under certain criteria, with the suspect in minor cases.

## SAFEGUARDS

Another important element of the proposal on the European Public Prosecutor's Office is the robust guarantees for the rule of law. The European Public Prosecutor's Office will indeed exercise a certain number of powers and those powers need to be counterbalanced by procedural guarantees and other safeguards. The proposal provides that the European Public Prosecutor's Office should have access to various investigation powers ranging from witness interviews, interrogations, to search and seizure powers, telephone taps etc. Roughly half of these powers, which are coercive in nature, should only be used subject to a prior judicial authorisation by a national judge. The proposal provides that such *ex ante* control would be vested in national courts competent to oversee investigations and prosecutions at the national level. Member states, of course, would be able to maintain any additional guarantees which exist under national law.

In addition, as part of the safeguards, a catalogue of rights for the suspects and the accused persons involved in the European Public Prosecutor's Office proceedings will be created. This catalogue will build on the relevant *acquis* of the European Union, including the Directives on the right to interpretation and translation, on the right to information, as well as the upcoming directive on access to lawyer. The proposal will, however, go beyond these rights and anticipate the continuation of the roadmap on procedural rights by creating genuine European rights: for example, it will include the prohibition from self-incrimination for

the suspect involved in the proceedings and the right to legal aid (which is indeed one of the rights contained in the Stockholm roadmap as well).

The third essential element of the safeguards is that the European Public Prosecutor's Office will have to respect, in all its activities, the Charter of fundamental rights, including when it presents evidence to national courts. Therefore, should there be a violation of procedural safeguards, including those provided by the Charter, national courts should be free to declare such evidence inadmissible. In every other case, the evidence must be considered admissible at courts without further procedural certification, provided it was collected in accordance with the Regulation and the applicable national law of the State where it was obtained.

### ADDED VALUE

The European Public Prosecutor's Office should develop its own prosecution policy and move beyond the fragmentation of the current national prosecution policies. In that sense it should have its own view about the threshold of the cases that should go to court, including the degree of suspicion that is required for investigations and the quality and quantity of evidence required for bringing charges, as well as in which cases the court's decision should be appealed against. The proposal will set objective criteria for determining the choice of jurisdiction in cross-border cases.

Another aspect which may bring an added value is the concept of "European territoriality". It is a concept which has been there from the beginning, ever since the *Corpus Juris* and the recent Luxembourg Study have put forward certain model provisions. The concept of "European territoriality" the European Public Prosecutor's Office will require a change of mentality: it seeks to overcome the obstacles of national territoriality – a concept upon which national criminal justice systems are built. How do we move beyond that? We move beyond that by considering the European Public Prosecutor's Office as a single office which can exercise its powers throughout the member States, within the territory of which mutual legal assistance is no longer required. Given that the European Public Prosecutor's Office should act as an office throughout the EU (and therefore beyond single member States' territory), the EU would be for the European Public Prosecutor's Office a unique (indivisible) territory, within which the EPPO can exercise its powers autonomously. This will crystalize through the presentation by European Public Prosecutor's Office of evidence that may be collected in various States and irrespective of any differences between national rules concerning their collection and presentation.

Finally, the last key aspect. Article 86 of the Treaty on the Functioning of the European Union requires that the European Public Prosecutor's Office be established by means of a Regulation, which should clarify a large number of issues concerning the European Public Prosecutor's Office, including its structure, procedures, judicial control etc. However this Regulation should not become a European code of criminal procedure, as there are clear limits imposed by the Treaties in terms of proportionality and subsidiarity. The requirement of clarity and direct applicability for regulations would normally leave little room for national implementation. Nonetheless, this Regulation will leave a wide margin of discretion for national law, but national law can only apply if the Regulation leaves something unregulated. The

Commission's proposal will require the combined application of the Regulation with national law, on the understanding that national law can apply to the extent that it enables the effective application of the Regulation. The proposal will also contain a review clause, foreseeing that within a few years the practical implementation of the Regulation will be revisited, including possible problems in the functioning of the European Public Prosecutor's Office, with the aim to review the necessity of introducing further harmonisation in some areas. Yet, the aim of the review exercise will not be a creation of a detailed code of criminal procedure.

### **IMPACT OF THE PROPOSAL ON NATIONAL AUTHORITIES AND ON EU INSTITUTIONS**

The investigations of the European Public Prosecutor's Office will be conducted, in most cases, by national law enforcement authorities, as it is done today. Therefore, they will continue to remain in charge, but under the instructions and under the coordination of the European Public Prosecutor's Office. In that sense, there will be an ever closer integration of national law enforcement through direct EU law enforcement. The key position in all this system will be the "European Delegated Prosecutor" who will have a "double hat": he will come from national prosecution systems and will be appointed by the European Public Prosecutor on the basis of a selection made by the member States. European Delegated Prosecutors must have experience in national prosecution systems and must be appointed as active prosecutors in the member states, so that they can exercise their powers in both "systems": in the European Public Prosecutor's Office and in national prosecution system. European Delegated Prosecutors will coordinate between national prosecution systems and between the European Public Prosecutor's Office. All coercive powers must always be implemented by national law enforcement authorities under the instructions of the European Delegated Prosecutors, and any measures restricting fundamental rights must be subject to the control of the competent national judicial authorities.

Accountability will need to be ensured in political terms as well. The European Public Prosecutor will have to report every year about the Office's activities to the EU institutions and can also be invited by national parliaments to give account about its activities. In other words, there will be an indirect control by national parliaments over the activities of the Office.

As concerns the impact on the EU institutions, the most important aspect is the proposal's impact on OLAF and Eurojust. A certain number of administrative and management links between these bodies will have to be created; and yet these three bodies will have to remain separate. The proposal will foresee that the European Public Prosecutor's Office has a single, separate legal personality, but it will have a certain number of links to Eurojust, including operational coordination and sharing support services. The same principle will be echoed in the Commission's proposal on the reform of Eurojust. There will also be a provision on Eurojust involvement in determining jurisdiction.

Finally, a word about Europol, which is specifically mentioned in Article 86 of the Treaty on the Functioning of the European Union. This reference is a reminder of the importance of the information and analysis that Europol can provide to the

European Public Prosecutor's Office. Indeed, the analytical work files which Europol compiles may contain elements of PIF offences. Europol, like any other EU agency, will be required to report any potential PIF offences to the European Public Prosecutor's Office. It should also cooperate with the European Public Prosecutor's Office during investigations. The European Public Prosecutor's Office shall have the power to request further information from Europol and request analysis on connections with other cases or with organized crime groups etc. It is very important to enable the European Public Prosecutor's Office to request further information and analysis so that it can form a broader view about the investigation.

## CONCLUSION

Once the Commission's proposal is submitted to the European Parliament and the Council, negotiations will start in accordance with the special legislation procedure of Article 86. These negotiations will hopefully enable a broad compromise on the text so that the Union's financial interests can be better protected, throughout the European Union, thanks to a robust, efficient and independent European body called the European Public Prosecutor's Office. We should not spare our efforts before we achieve that goal.

# Eurojust: its role in the fight against fraud and the necessary collaboration with the future European Public Prosecutor's Office

*Check against delivery*

**Francesco Lo Voi**

*Prosecutor, Italian representative at Eurojust*

*After supporting the need for the offices involved in the fight against Community fraud (Eurojust, OLAF) to cooperate with each other, the author focuses on the competences of Eurojust, highlighting how close these are to those of the future European Public Prosecutor's Office. According to the author, in the long process of creating a new institution there is always a "before", a "during" and an "after", represented, in this case, by the list of crimes within the competence of the European Public Prosecutor's Office, its structure and its rules of procedure. Referring to "Prosecution Policies", the author believes that a change is required in the mindset of Italian magistrates, given the rules stipulated in Article 11 of the Italian Constitution.*

I would like to thank not only President Paciotti, but also the organizers of this conference I say this not just to observe the formalities but because I think that the high level of the participants and the speakers at this conference represents a rare opportunity for me; and therefore it is particularly satisfying to be here in a personal capacity not just as a representative of the Italian Desk at Eurojust.

In truth, there has been little talk of Eurojust so far; most likely this is also due to the unexpected absence, arising from last minute commitments, of our president, who yesterday would certainly have illustrated the role played by Eurojust up to now, and the role it is likely to play in the future. Of course that is not what I will be doing but I shall nevertheless try and give a brief outline. Little has been said about Eurojust because discussions have, quite rightly, focused on OLAF. But I think that in a debate on the "European Public Prosecutor" we should also speak of Eurojust. I have always been convinced, that anyone who is part of an institution, and anyone who is part of the institutions, has a duty to cooperate with other institutions, with all those who represent other institutions and with what other institutions represent. This is a conviction that I still hold and of which I have become even more convinced as a result of my experiences in Europe; so I believe that all European institutions, and among them I, of course, include Eurojust, should cooperate. So Eurojust should cooperate first and foremost with the European Commission, with the Council of the European Union, with the European Parliament, as we have already done for other initiatives and in other circumstances.

Since we must work together, and we certainly can't have one institution com-

peting against another, one office against another office, I will not assign any rankings in order of importance, with reference to the establishment of the European Public Prosecutor's Office, between Eurojust and OLAF. So I will not say that Eurojust is almost as important as OLAF; and neither will I say that OLAF is almost as important as Eurojust: I will say that both are important. What we have to go on first and foremost, apart from what has already been underlined with reference to OLAF, is the text of Article 86 (it has been repeated so many times) and that famous "from Eurojust", translated in Italian as "a partire da", the meaning of which has made us all rack our brains in an effort to give it some sort of content.

And just recently, during a meeting under the current Irish Presidency, which also included the Consultative Forum of Prosecutors General - one of the many initiatives that Eurojust has dedicated to the issue of the European Public Prosecutor's Office - it was stressed that a European Public Prosecutor's Office needed to be anchored to national systems; that it should be established by harmonizing crimes, by clearly defining the respective responsibilities of the European Public Prosecutor and national authorities. There is a series of institutions that all need to work together and collaborate. Well, rather than racking our brains and trying to understand how to interpret that "from" and what content to give it - although we are working on this in Eurojust, examining different scenarios and types of cooperation - I have tried to ask myself (and I will try to ask you): why did they write "from Eurojust"? It was already quoted in the immediately preceding Article 85? Then why also include it in Article 86? For what reason? I can sense that one of the reasons is that the European Public Prosecutor's Office, whatever its structure, will not, in fact, be able to manage without Eurojust and will have to work in conjunction with it. This is one of the reasons why, in my view, the word "from" was included. We already do and have done for many years a whole series of tasks that are largely the same as those to be performed by the European Public Prosecutor and which have just been described by Peter Csonka.

We carry out activities that are already integrated into the investigative scenario; we are in constant daily contact with the national investigative and judicial authorities of all 27 Member States (soon to be 28) of the European Union; we are always ready to provide assistance in investigations with non-EU countries; we have already carried out numerous activities to coordinate investigations, which is our *raison d'être*, our core business; we carry out activities to help prevent, as far as possible, conflicts of jurisdiction, and, therefore, to prevent cases of *bis in idem*; we conduct activities, assist in and facilitate the execution of European arrest warrants. And so far we have done all this despite not having binding powers - Article 85 still has to be translated into something. So we have often carried out these activities despite the objective difficulties arising from the differences in the 27 national legal systems, especially in procedural terms. This is what the European Public Prosecutor will have to do; now, if you will allow me a small personal opinion, slightly different from what Peter Csonka said a little while ago, yes, it is true that the system of mutual legal assistance will end (international judicial cooperation), but it will end only within the countries that form part of the European Public Prosecutor's Office, and it is not anticipated, as far as I know, that this will include all 27 countries. National mutual legal assistance procedures will remain

with other countries, especially with non EU countries. So my interpretation of the reason for and explanation of that “from” brings us together. This does not mean setting one office over the other but it means the European Public Prosecutor will be doing a similar job to what Eurojust has already been doing for several years, with experience already gained and contacts already acquired.

I come to the second part of my speech, please allow me a small digression, because I do now want to miss the opportunity offered by president Patrone as regards the national situation. I shall venture a little outside the official institutional context of Eurojust to make some very personal considerations, which, however, take into account the experience I have gained in Eurojust, as well as at the national level. Because it is from this experience and observation of actual everyday cases that I can say, to be clear, that I should like from tomorrow morning a European Public Prosecutor that is mandatory for all 27 (soon 28) European Union Member States, and without any chance of an opt-out: I would like it to be an office that is responsible for all crimes, or, at least, for the most serious crimes; and I would like it to have a package of effective procedural measures that are automatically applicable to all European Union countries, without question. This is my personal view as an idealist. So these brief considerations are not intended to be critical of what has been proposed so far, or what will be established in the future; they have a different aim. Because when I come back to carry out national judicial activities, I would like to have a set of tools which at present are not there; and I would like the European Public Prosecutor to have them. If I see a list of problems, then I worry because I think that maybe we should make more of an effort.

A very personal opinion of mine is that in these long processes of creating new institutional offices there is always a ‘before’, a ‘during’, and an ‘after’; and sometimes it is not always easy to know what comes ‘before’, what ‘during’, and what ‘after’, because positions may change. So in the ‘before’ phase, for example, I would make a list of the offences for which the European Public Prosecutor should be competent and have exclusive competence, as we heard in the proposal (we shall see what will happen later at the Council and see what happens in European Parliament). If I see a series of hypotheses, which I think should be in this list of crimes within the jurisdiction of the European Public Prosecutor (such as VAT; such as fraud in public procurements or tenders; rules relating to prescriptions or regulations concerning minimum punishments), some of which are there and some not and then we have a discussion about what to include and what not to, then I worry little because as an idealist I would like something more.

The ‘during’ phase: the structure of the European Public Prosecutor’s Office; I can say that on the whole this is of less interest to me, as long as it works: the office is too collegial, so I do not know how well it can work.

To work properly we need procedural rules. This was discussed, there are proposals and we have also discussed it at Eurojust. We talked about the issue: rules of procedure are a matter that do not allow for diversification. Because if we diversify the procedural rules according to the needs of each country (I speak of the countries participating in the European Public Prosecutor’s Office), we really run the risk, as Vladimiro Zagrebelsky said earlier today, of ending up before the Strasbourg Court. The risk remains because if evidence must be acquired in a certain



way in one country and then it is used in another, the procedural differences between the two may prevent it from being accepted. Similarly, it is not possible, in my opinion, for different countries to have their own system of obtaining evidence: the system must be the same, otherwise it cannot work.

Will there be an agreement on the rules of procedure? This question, in my opinion, is more important than the one concerning the structure of the European Public Prosecutor's Office. There is the problem of independence and the different constitutional positions on this issue held by the countries represented, of course, in the Council of the European Union. We were reminded today of the recommendation of the Council of Europe 19/2000, which should be taken into consideration. My fear is that we shall keep to a low level, the result being more one of image than substance, aiming perhaps to get as many states as possible participating in the European Public Prosecutor's Office, so that at least we can get it up and running with a significant number of states through the system of enhanced cooperation. Returning to the comparison Luigi Berlinguer made yesterday with cars: I wouldn't mind so much building a "Ferrari" and limiting the speed to that of a "Cinquecento", but I wouldn't want to build a "Ferrari", with all its costly bodywork, costly interior and costly accessories, and give it the engine of a "Vespa". Or, as they say in Italian, I wouldn't want "the mountain to give birth to a mouse".

Let me now leave aside the European aspect and look just at the national level. We are accustomed to the widespread power of public prosecutors, a judiciary with an institutional and constitutional framework, which, as we all know, is not the same as in other European countries. Sometimes there are similarities, but mostly there are big differences. I am very attached to the Italian system, and I have defended it from the rooms of the National Association of Magistrates and the rooms of the Superior Council of the Judiciary. However, I cannot fail to realize that if all the other countries have a system that is different from our own, it will be difficult to convince them that they are all wrong and only we are right. Maybe we shall follow a middle course: this is another risk that I see and which I shall bring up for discussion maybe in one of tomorrow's sessions on the consequences for Italy of the establishment of a European Public Prosecutor's Office. As Hans Nilsson rightly says, we need to overcome constitutional limitations (I'm not sure if all countries or all the constitutional courts of European countries share this approach, which is right) and, quoting again Berlinguer, we need a change of mentality. We Italian magistrates have to start changing our approach a little: we cannot be pro-Europeans on alternate days, we will have to change our views a little on the idea of receiving instructions. From small windows of opportunity opened by national legislation a change of mentality that leads to the idea of a different structure from those to which we are accustomed in our legal system is essential, otherwise the European Public Prosecutor's Office won't work; and this time not through the fault of other institutions or other countries or European institutions: things won't work in our country and it will be our own fault. And the change in the mentality of Italian judges will be necessary because there will be changes that will certainly impact the judiciary, and which will most likely also impact the constitutional order. And Italian magistrates have to be ready for these changes; and must be ready, not for the European Public Prosecutor's Office (which will function one

way or another), but because it is required by the Constitution. Article 11, which is in the first part of the Constitution (no one is suggesting changing this) states: “Italy [...] agrees, on conditions of equality with other states , to the limitations of sovereignty necessary for an order that ensures peace and justice among Nations; it promotes and encourages international organizations having such ends in view”. I believe that the reference to the Constitution may be of use and should be followed by Italian magistrates.

# Protection of the EU's financial interests: distribution of roles between OLAF and the future European Public Prosecutor's Office

*Check against delivery*

**Andrea Venegoni**

*Prosecutor, Temporary agent at OLAF*

*After reflecting on the current two-tier system (administrative and criminal) for the protection of the financial interests of the European Union, the author focuses on a possible scenario involving a division of roles between OLAF and the future European Public Prosecutor's Office (EPPO).*

As the only representative of OLAF present at this conference, let me first of all say that our Director General, and Italian colleague, Giovanni Kessler, regrets he cannot be here today and sends you his best regards.

After hearing the words of Franco Lo Voi, especially, and as a member of the European Commission team that has for the past few months been writing the proposed regulation, which will soon be ready, I feel an even greater responsibility for what we have done and what we are doing. If this proposal has such a disruptive effect that it will also produce constitutional changes, it means that it really is of great importance. I count, however, on your support since we are all convinced of the need for this project.

In my opinion, and in the light of what has been said, I think we should try to clarify, if we can, why the establishment of the EPPO can help protect the financial interests of the Union. One of the few things that we know for certain about the EPPO project is that, at least initially, its competence will be limited to this area. We know today that the Community's finances are protected by a two-tier system: at the administrative level, in which OLAF carries out its investigations, and in terms of criminal law, which today is entrusted exclusively to the judicial authorities of member States.

As for OLAF investigations, let me first respond to a specific aspect that has come up in some speeches made this morning, in which OLAF was mentioned several times. I do not wish to come to the defence of OLAF, which has no need for it, and my job is not that of a defending counsel but a public prosecutor. However, I think we should remember that, despite all the problems the Office has had over the years, our story is also one of success. So it would seem only fair to mention the positive side, too. The statistics published in OLAF reports (the latest was released a few days ago) show how much Community money the Office's administrative activities has helped to recover and save from fraud and other irregular

conduct, thus preserving an asset which, it should be stressed, is not something aseptic and outside the community but something that belongs to each of us, each EU taxpayer.

All this has been done through the activities and investigations of OLAF, in full compliance with the guarantees of defence and basic principles. Defence guarantees in OLAF investigations have been progressively strengthened over the years, thanks to the action of the Court of Justice, and now resemble civil guarantees in criminal investigations. For example, in the examination stage, the person concerned is informed of the right to silence, the right to be assisted through a legal counsel or a person of trust, and that his or her statements could be used in criminal proceedings. When conducting other typical investigative measures, in particular the so-called “spot checks” in accordance with the two regulations of 1995 and 1996, the national authorities of Member States are informed and action is carried out in conjunction with national authorities. Obviously, use is never made of any particularly intrusive methods to enter premises, nor are persons forcibly compelled to hand over documents. Everything is done respecting the rights of the person and in accordance with fundamental principles. If we look at the Court of Justice rulings on OLAF cases, we will see that most do not concern issues of serious violations of rights of defence during individual investigative actions (for example, failure to inform suspects of the right to be assisted by a lawyer or other similar situations), but regard much more technical and formal aspects, such as procedures for the transmission of OLAF reports to judicial authorities, or the means or terms of the information given to the General Secretariat of the European Commission or to the Monitoring Committee on the transmission of reports to judicial authorities. This does not mean, obviously, that the issues are unimportant and that European rules and regulations should not be respected, but I think it is right to put things in their proper perspective, especially in relation to what was said in some speeches today.

In this regard, someone this morning asked what recourses there were against OLAF actions, as if the Office could conduct its investigations with impunity. Well, against OLAF actions a plaintiff can make the normal judicial appeals to the Court of Justice in terms of non-contractual liability (in fact it is possible to sue the European Commission for non-contractual liability as a result of alleged damages caused by OLAF) or ask for the annulment of the act. In the past, when dealing with OLAF investigations, I was involved in cases in which, for example, the issue of spot checks was brought to the attention of the Court of Justice. In substance, a person subject to OLAF investigations benefits from a range of defence guarantees that are very similar to those in a criminal investigation.

As regards protection of the EU’s financial interests through criminal law, this is currently entrusted exclusively to member States, which often receive information from OLAF. There is, of course, nothing to stop member states from initiating criminal proceedings even in the absence of an OLAF report, and indeed this situation is the most usual.

The question we might ask, then, is whether the system based on these two levels (administrative and criminal) is sufficient today for the protection of financial interests and if anything can be done to improve the system. The possible intro-

duction of the European Public Prosecutor's Office is precisely part of this issue. A solution that continues to use a "two-tier" system to protect the Community's finances has, in our opinion and in our actual experience during these thirteen or fourteen years, quite a few drawbacks. The most common drawback we have come up against over the years is that when OLAF is the first to get information on alleged irregularities, and then carries out its own administrative investigation, the transmission of information to the judicial authorities only happens when criminal elements emerge, and thus, normally, at the end of the administrative inquiry. What is more, as a rule, OLAF only receives information some time after the event, something like one or two years. Then more time passes, especially if the facts are complex, while OLAF carries out its investigation. Thus, when the OLAF report is forwarded to the judicial authorities for criminal investigation, a number of years have already gone by, as many as four or five, after the event. In essence, this means that the crime has nearly expired under the statute of limitations - at least that would be the case in Italy.

This situation has happened many times. It is no coincidence that Italian colleagues receiving OLAF reports have highlighted this aspect, stressing the need for the reports to be sent not at the end of the investigation phase but during it, or as soon as any criminal elements emerge. In practice this is what we try to do. However, the presence of two levels carries the risk of a certain lapse of time before criminal judicial authorities are informed.

Another drawback in the current situation of the fight against Community fraud concerns the criminal aspect specifically. This is true both when only this level is concerned (in cases where member states directly initiate investigations without receiving information from OLAF) and when both levels are involved (OLAF and then the judicial authorities). We have already heard during the conference that, as regards criminal law, the European Union consists of many criminal justice systems, each different the other. This fragmentation, this variety of legal systems, especially in cross-border cases, does not help the circulation of evidence and transmission of reports among judicial authorities.

Moreover, even in cases of Community fraud that do not involve more than one Member State but which are purely national, investigations can be slow and lack homogeneity. Perhaps the biggest problem here is that judicial authorities may lack a certain amount of sensitivity to the importance of these cases. I obviously do not wish to generalize but quite often this has been our experience. It would seem that Community fraud fails to produce great social alarm because no deaths are involved and so no urgent measures are required. The cases are rather technical and from the legal point of view may also sometimes require knowledge of European law. Again, I do not wish to generalize, but if a judicial office is already overloaded with cases (and we know what it is like in Italy), there may be a tendency, understandable from the point of view of the individual prosecutor or judge, to give priority to those which are perceived to be the most urgent, among which, for various reasons, we do not find Community fraud. The conclusion is that often we have had to accept the fact that these cases have expired under the statute of limitations. In the long term, at least in certain cases and in relation to certain types of expenses, this also causes damage to the Italian state. The non-recovery of sums

appropriated from the Community because of fraud, in the end, has negative effects even on state finances, through procedures which can be very complicated, leading to financial readjustments or smaller sums being allocated in the following years' programs. In this, Italy unfortunately leads the way. This situation has led to decisions by the Court of Justice that have cost Italy dearly, having an impact of hundreds of millions of euro on the Italian state, with the majority of citizens being almost completely unaware of the fact.

The current system for the protection of the financial interests of the Union, therefore, does not seem to be one of the best.

If we consider all these aspects, we could say that maybe there are good reasons to change course. A possible change, one supported by many, could involve strengthening the existing tools without creating a new authority. The problem remains, however, of how to strengthen the existing instruments. The two-tier system will always produce these drawbacks. We could get OLAF to transmit information on offences more quickly, but this will not eliminate the problem of the delay with which the court authorities learn about them. As regards cross-border investigations, we could improve the judicial cooperation system through the approval of the "European Investigation Order", for example. However, the principle on which this is based presupposes the mutual extraneousness of the judicial authorities involved. Although it would certainly be an improvement, it is not a radical solution because it does not solve the problem of fragmentation and slow procedures. When the European Commission launched the project for a European Public Prosecutor's Office, after the entry into force of the Lisbon Treaty, it had already conducted preliminary studies and in 2011 issued a communication with the aim of examining and strengthening the protection of the EU's financial interests. In this communication, the Commission states that a survey was carried out among prosecutors in several member states, in which they were asked about their practical experience of dealing with cross-border cases. The result reported by the Commission was that 60% of the prosecutors interviewed said that international or cross-border investigations were seen as problematic. So if a rogatory letter is needed, sometimes the investigation is abandoned because of uncertainty about modes of transmission, the identification of the authority to address the request in the foreign country, the length of time and manner of response. And all this does not exclude the possibility that a response could then require a further rogatory letter. To avoid these problems, the tendency is to keep the investigation at national level only, which would mean not having a broad vision of the event, losing the chance of acquiring evidence which could be very useful not only for the prosecution but also for the suspect. The suspect obviously has a defending counsel and the defending counsel could urge the Public Prosecutor to act, but sometimes the defending counsel might not know that there is a document in another member state that could be useful to his client. Thus, not having the chance to carry out wide-ranging cross-border investigations can weaken an investigation.

In our opinion, the best solution is to propose a radical change, one which would both reduce or eliminates the current "two-tier" system and make it easier to carry out criminal investigations. Regarding the former, when OLAF is the first to receive information that appears to contain criminal elements, the office could

then immediately inform the criminal authorities without first conducting its own administrative investigation. As for the second aspect, we need to strengthen the tool of criminal investigation, in both domestic and cross-border cases. An office like the one briefly described earlier by Peter Csonka, in which the relationship among prosecutors of different States is not one of authorities belonging to different legal systems but one in which they belong to the same office irrespective of nationality, has elements which, in our opinion, would substantially improve the current situation of cross border investigations. In addition, creating a pool of judges specialized in and dedicated to these proceedings throughout Europe would improve matters also in the handling of purely national cases. Of course, as Franco Lo Voi said, if we create a “Ferrari” we also have to give it a “Ferrari” engine. And our aim is to create a “Ferrari” with a “Ferrari” engine. However, the engine also needs petrol, and someone to fill the tank. Since the European Public Prosecutor’s Office will work on crimes within its competence, all parties involved in establishing these rules should all do their bit (not just the European Commission, but also member states and the Parliament), not only as regards the EPPO regulation specifically but also the legislation that is complementary to EPPO activities.

Several times in recent days mention has been made of the proposal for a Directive on substantive criminal law (the PIF Directive), adopted by the Commission in July 2012, which is the fuel that will drive the EPPO engine. Because if the EPPO does not have uniform substantive law on the offences it will be dealing with, we are back to square one. Therefore, the negotiations on the PIF Directive with the states and the European Parliament need to ensure the homogeneity which is absolutely necessary for EPPO to operate properly and avoid the fragmentation that the regulatory framework of the Lisbon Treaty, if interpreted in a certain way, partly authorizes. The Commission has done its bit in observance of the principle of proportionality, and according to some it has acted too timidly in not resorting to the instrument of regulation in the legislation on substantive criminal law. It is true that the proposal for a PIF Directive still gives national systems a lot of leeway in the definition of crimes but at least the legal basis identified by the Commission, Article 325 TFEU, guarantees application throughout the Union. In our opinion, therefore, there should no doubt about the legal basis for the initiative on substantive criminal law and it would be desirable for Member States and the European Parliament to back this idea so as to avoid the risk of returning to the situation prior to the 1995 PIF Convention. Therefore, a common basis that includes substantive criminal law is needed for the EPPO to operate.

If the EPPO as described above comes into force, there will arise the question of its relations with OLAF, which is, in fact, the only judicial cooperation authority which at present carries out real investigations to protect the EU’s financial interests. To avoid prolonging this duplication of administrative and criminal levels, we believe that, in principle, the investigation of PIF offences should only involve the criminal level (at least initially). Getting an administrative authority to conduct investigations on facts that in themselves also contain a criminal element does not seem to be a very efficient way of using resources. In such cases, it would probably be best to immediately hand over investigations to a criminal authority, which has greater powers in this field.

This might seem to suggest that, once the EPPO came into force, OLAF would no longer serve any purpose and should cease to exist, as the two spheres of activity would overlap. In fact, this is not so because OLAF, which is a rather complex office, conducts a variety of different types of investigations, some of which do not fall within the competence of the EPPO. As regards the so-called internal investigations (for example, investigations involving officials or members of the European institutions), illegal or irregular conduct by European institution staff does not always affect the financial interests of the European Union. This morning, a speaker mentioned a recent case involving a European Commissioner, which is presently keeping our Director General busy, a case which, if the EPPO were established tomorrow, would be beyond its jurisdiction. Apart from the concrete elements of this particular case, which we shall not go into here, the corruption of an EU official or a member of an EU institution or abuse of office (for example receipt of money to put forward amendments to legislation or adopt legislation that favours their own interests) are behaviours which, in themselves, do not directly affect the financial interests of the European Union. They are violations, sometimes involving criminal acts, of codes of conduct committed by an official, but do not affect the EU's financial interests if Community funds are not directly involved. So these types of behaviours, which at present trigger internal investigations by OLAF, should not fall within the competence of the future EPPO precisely because they do not threaten the financial interests of the Union, which is why OLAF should continue to exist.

In addition, there is another area of OLAF activity, defined in the Decision establishing the Office and which is little known – the competence to investigate all breaches of Community law, not just those affecting financial interests. The sector in which OLAF has typically operated in recent years is the counterfeiting of goods, a sector that is very delicate because it can affect goods which, if not authentic, can also be extremely dangerous for health and safety, such as children's toys or spare parts for cars. Counterfeiting does not necessarily involve a violation of EU rights, even in the case of imported goods. In fact, there are cases where counterfeit goods are declared at customs when they are imported, of course without mentioning they are counterfeit. If 100,000 counterfeit dolls are imported under a famous brand, and the exact amount is declared at customs and the duties are paid, there is no damage to the financial interests of the Union. However, this conduct constitutes a breach of other Community provisions on counterfeit products, which protect different interests, for example, health. In the above example, the materials or dyes used in the counterfeit dolls could, when touched by children, be extremely harmful. These situations are within OLAF's competence. In fact, a specific section was created within a unit that is responsible for investigating cases of counterfeiting. This type of conduct, too, might not affect the financial interests of the European Union, so it would not fall within the competence of the European Public Prosecutor's Office. The conclusion, then, is that even with the establishment the EPPO in the form that we have talked about, there is still the need to maintain some OLAF structures to conduct investigations that do not fall within the jurisdiction of the EPPO.

During these months we also had to think about the number of people that



would be leaving OLAF to join the EPPO. Technically, this part of the work on the EPPO Regulation has, for me at least, been the most complicated, even if the EPPO regulation cannot obviously be so explicit and detailed on this point. The proposed Regulation will probably state (I say 'probably' because the official text as of today, June 2013, has yet to be finalized) that the EPPO will collaborate with OLAF and the relations between OLAF and EPPO will be governed by a separate agreement. This is the most likely scenario.

We have also had to study things from the practical point of view. We may suppose the OLAF staff that will be moving to the European Public Prosecutor's Office will be working at the headquarters of the European Public Prosecutor's Office, which we have heard about in the other interventions. Since the headquarters should also be initiating its own investigations in certain cases, it will need staff of its own, as well as police authorities from member states. So at least some of OLAF's staff should be moving to this office.

This is the situation at present. How can these changes be made? We must remember that there is also a Regulation on OLAF procedures which is currently being approved, even though it was presented, if I remember correctly, in 2004 and the negotiations are still (June 2013) in progress, though nearly at an end. If this Regulation is approved and then Prosecutor's Office is also established, we cannot exclude that further slight changes might be needed. This, then, briefly stated, is a possible scenario for relations with OLAF.

# Issues to be addressed in the establishment of a European Public Prosecutor's Office: structure, jurisdiction and protection of fundamental rights

*Check against delivery*

**Fritz Zeder**

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*Recalling the previous discussions that led to the Corpus Juris and the European Commission Green Paper, the author declares that despite the change in scenario, the issue remains of topical interest. The author is in favour of the establishment of a European Public Prosecutor's Office (EPPO) and points out the aspects that should be addressed (identification of applicable national law, indication of the court responsible for reviewing the decisions adopted by the EPPO, etc.).*

I will start with a remark that doesn't have anything to do with the European Public Prosecutor (EPPO). I'm now for about 19 years working for the Minister of Justice in Austria and I have been negotiating quite a lot of European laws also implementing them. Inter alia, early in the 90ies I have been negotiating the old Convention for the protection of the financial interests of the European Communities and accompanying protocols (the "PIF Convention"). And another thing that I negotiated was the new Eurojust decisions.

As far as I see, we are facing today two major challenges in that work in the European Union without example before. The first one is the challenge of the situation of the UK. As you might know, the United Kingdom is considering if it makes use of the right which is accorded to it in the Lisbon Treaty, to pull out of all the Criminal Law and Police instruments which were adopted before the Lisbon Treaty. I just wanted to raise that, because I think that's a major problem for all of us because that would mean that the UK pulls out of nearly everything which we know, including the European Arrest Warrant; the Exchange System for the Criminal records; substantive Criminal law, Eurojust, Europol etc. With the paradox that if they do that and if they don't re obtain which they could do -for example to the European Arrest Warrant- then they will have to continue the European Arrest Warrant in relation to Norway and Island, but not to the member States.

Having said that, I will come immediately to the second challenge which we are facing during the next years that is, of course, the European Public Prosecutor. And there, in the frame I've got in this afternoon session, I will focus on the questions: what is the relationship of the future EPPO to the national proceedings? Who investigates and which procedural rules apply? And also which court has to control the action of the European

Public Prosecutor? In the title of my intervention you'll find the word "in particular"; and this means that I will, as yesterday has been said by Hans Nilsson, "everything is linked to everything" and it's complex. So I will also touch a point without going into depth: questions like the structure, the competence and the Fundamental Right Issue.

If we start with a short look back, the idea of the European Public Prosecutor is already very old. Many of you might know that the idea comes from the 90ies: there was the *Corpus Juris* Project One and Two; were already offences the PIF, but also others were provided for and the EPPO was proposed at that time. At that time no thinking was about the legal base: it simply didn't exist at that time. The Commission had tried already in 2001 in the frame into the Intergovernmental Conference which led to the Nice Treaty to introduce and propose a legal base into the EU Treaty. At that time, it was Article 280 A: this was not discussed and, of course, not adopted. The Commission insisted at that time with the Green Paper of 2001 on the issue; that was a public hearing in 2002 and then, more or less, the discussions stopped. And only now it is as the Lisbon Treaty has entered into force, the issue is on the agenda again. But when you look into the arguments which the Commission uses in their Paper, sometimes you have the impression that the old arguments are repeated. And I just want to point out that the environment has changed compared to ten years ago: we have now Mutual Recognition; we have the Arrest Warrant, we have ECRIS; we are waiting that the whole system of Mutual Recognition is to be completed. What we are waiting for is that the European Parliament adopts a position concerning the European Investigation Order which is a huge thing because it replaces the old system of Mutual Legal Assistance. We also have minimum rules now in Procedural Law, we have Eurojust; we have also the approved decisions concerning the Police cooperation. So the overall environment has changed.

And one remark to the more recent history, as yesterday reference has been made to the Stockholm Program. There is a Stockholm Program which was adopted by the European Council; and where, if you look at the screen, you see that there the Member States were very reticent vis-à-vis the European Public Prosecutor. They said: first we should develop Eurojust, then we should essay how this is implemented; and then only we could start to think on other possibilities like, for example, giving more powers to Eurojust or setting up an EPPO. But, as I said, there's not only the Stockholm Program: immediately after the Stockholm Program was adopted, the Commission published what is called "the Action Plan of the Commission" to implement the Stockholm Program. And there -it's the same thing for other things, but also for the European Public Prosecutor- the Commission is proposing or announcing different steps to what is said in the Stockholm Program. It says that there will be a communication on the establishment of a European Public Prosecutor. Nowadays, we are at the point that the Commission is even more ambitious than its own communication has said three years ago. So we are at the "if" of the proposal which will come early into life if things run like seen at the moment.

The Lisbon Treaty in Article 86 says that the Council may establish; so I think, as somebody has said today, "as it is in the Treaty, there's no need to think about if it's necessary" that is not true: in fact, as the Treaty says "may", that implies that one has to think about the necessity. There is a special legislative procedure; as you know, there is a unanimous decision which is necessary in Council and which will cause us

quite a lot of problems. And if a unanimous decision cannot be taken, then a smaller part of Member States can go into the enhanced cooperation.

As to the substance of the European Public Prosecutor, the article 86 says primarily “PIF” crimes should be covered, but there is the possibility of extent that to serious cross-border crime or serious crime with cross-border dimension. And again, there is a unanimous decision to be taken for that extension; but this time by the European Council, not by the Council. And there is a question mark: if order future 28 member States would accept to have that broader competence. And then, these two words which are ambiguous: “from Eurojust”. Now on the tasks of the European Public Prosecutor, the Treaty tells us that he should investigate, prosecute and bring to judgment; and then exercise the functions of the prosecutor in the competent court of the member States (apparently the second part refers to the trial phase).

Now we have had already a lot of discussions during this conference why to be needed the European Public Prosecutor. I would sum up the main reason why it is necessary or it is regarded to be necessary. It is simply that national authorities do not investigate, prosecute and convict EU frauds the similar sufficiently effective manner.

Now I will come to the questions that I addressed already at the beginning: the main issues which are at stake, concerning the relationship generally speaking with national systems. Relation to national proceedings: who investigates, which procedural rules and what about Court control.

First point: the relation to national proceedings. There I think that’s the easiest point. As has been said already by Peter Csonka, there should be an obligation for national authorities to refer a case to the EPPO. There should be exclusive competence for the PIF-crimes that is the plan of the European Commission; and I think if we want to have something which we call European Public Prosecutors, then this must be the solution. And then, of course, the EPPO should also have the right to refer a case back to the national level.

Second issue: which investigating authorities? There are several possibilities on the European level or on the national level. If you take the European level, then you have to say at the moment Europol doesn’t have any investigative power.

And then we come to the question of what about OLAF. As far as I see it, the plan is more or less to have OLAF play a role something like the *police judiciaire*; OLAF at the moment is not foreseeing in the treaties. I also make a remark here concerning the way how the discussions run: it would be quite abnormal or even unthinkable for a national situation that an authority which has more or less the power of *police judiciaire* or customs or whatever be so strongly implied in the political discussions of how the judiciary should be organized. But that is the situation which we have on the European level; and all of you have been aware of what the problems with these situations might be (just in the last weeks). The other possibility of who investigates, who does the real work, is the national level. That means the national prosecutors or, as has been said, the “double-hatted” National-European Public Prosecutors; and, of course, behind there is the Police and the Customs. This is linked, in my opinion, to the question of which structure you choose for the European Public Prosecutor. Theoretically, there are three models: either you have a centralized or a decentralized or a combined model. Peter Csonka has told us before that the Commission is aiming for the combined solution, the small central office apparently on the few people; and then the major part of the work should be done by the delegated European Pub-

lic Prosecutors in the Member States with that double hat.

He hasn't done that today, but very often Peter Csonka is saying also that the plan is that the European Public Prosecutor should be cost neutral; so he shouldn't cost us anything. So if we look at what is at stake indeed just has said it before: it is about €3-€5 billion a year. I think we should be a little less modest and say let us spend some money in order to get back these billions. In Austria there is some statistics saying that Tax Auditors (so people who are going into the enterprises and investigating if the tax rules are kept) bring in 25 times their cost. But the main question at the end is if the reason why we establish a European Public Prosecutor is that we are not happy with how the national authorities deal with these cases; then why do we say 95% of the work still has to be done by the National authorities, with just a small office in Brussels or in Luxembourg. The EPPO is conceived to be a supranational small body; it is not the cooperation model. So, as Peter Csonka has pointed, there is no Mutual Legal Assistance; there is no Mutual Recognition; if the European Public Prosecutor order something, then it has to be executed if it comes to investigative matters in any of the participating member States. As Peter Csonka has said: territoriality principle.

The National delegated prosecutors with that double hat in the morning have the European hat, they order something which is to be executed in other participating member States; and, after the coffee break, they act as national prosecutors. And Hans Nilsson has given us marvelous examples yesterday of the problems if you have two hats.

Another question: which rules for the criminal procedure? As it is clear that the rules for the trial have to be national because the Treaty is very clear with that. The Treaty says that the EPPO has to fulfill its role as prosecutor before the national courts; but the Treaty does not clearly say which criminal procedural rules are applicable before, so in the investigative phase. That is open; and again theoretically there are several models which are possible.

I have here a slide which says the roles between the police and the prosecutor; between the prosecutor and the Court; between what is done in the investigation phase; what is done in trial phase; also if there is opportunity principle or legality principle that is different in all the member States. Somebody has mentioned today that the European Arrest Warrant is issued by a judicial authority. But still there are some countries where primarily the investigation is done by the police.

If you take these differences of the national system, you will have 30 different systems very soon inserted because in the UK we have three. Then, of course, if you have European rules, then it would be one more rule, one more set of rules. And one could take, for example, the model rules which were drafted in the framework of the project of the University of Luxembourg. And there the problem is how will this evidence, which is gathered on the basis of this European rules, afterwards be used in the trial which grounds are according to National law?

But if we take the other, the more modest solution, saying that we keep the 30 systems, then that means that the EPPO has to apply all the 30 different systems. And I am asking myself how this can lead to an equal application and how the EPPO will work with this set of rules; and how, for example, they can really implement the principle of territoriality.

Again, if you look at the main argument why the EPPO should be created, I would favor a European solution to have these model rules from Luxembourg. We have heard now that the Commission is planning to have some rules and some guarantees;

but the National law will do the rest.

Which leads us to the last question which is: which courts? It is again clear that the trial is done by the National Court: but which judicial control do we have in the investigative phase? I would again favor here a European approach; and the problem with that is that, according to the Treaties as they are now, it could be legally feasible to have a judicial control *ex post*. So if the European Public Prosecutor orders something, then afterwards a European Court decides; but, as Peter Csonka has said, there are quite a lot of more intrusive investigative measures where, according to legal tradition in Europe, it is not sufficient for the Court afterwards to decide: it is necessary for the Court to allow that this investigative measure is taken.

So we need something like a European pre-trial Chamber; and this is not possible under the Treaty as it is now with some ambiguity because one could imagine some model like the Benelux Court. But the other solution to go with everything to the National Court and to leave it to them, to go to the European Court of Justice via a preliminary rulings, we all know that national courts are very hesitant to do that. And I have seen lots of cases in Austria where to me it was absolutely clear that the case would fall under the CILFIT close. So there is an uncertainty in the legal situation; and the European Court of Justice should have been asked, but the Court didn't do that. Because it's a lost of power for the National Courts if they ask the European Court of Justice and the European Court of Justice tells them now what to do. As long as European Court of Justice hasn't done so the National Courts are free what they do. So I would favor again here the European model; and an example for that is the question of the choice of forum.

We need concrete rules; we need the justiciable rules. Why is it so important in which country the trial will take place? And why is *ne bis in idem* a fundamental right? And the framework decision on conflict of jurisdiction is close to zero; so there's no use with that. And I don't think that it is possible for a national court to decide which is the appropriate forum to go for trial in an EPPO case.

So to sum up, I think that the EPPO should be a strong European body that we have European procedural code on the basis of which we work; and that there is a judicial control on European level that means probably that we need to change also the treaties. But, as you all know, before the intergovernmental conference also there will be another reform. And that means that there is also a repercussion on the structure: I'm sure that a real college model will not work; and I also think that if we go for a real European Public Prosecutor, then it would be not a good idea and not conceivable to limit the competence of such a European Public Prosecutor to the PIF-crimes; because it would be an enormous effort and so we should go further and go for a serious cross-border crimes like traffic in human beings.

In the discussions in the last month, I have very often heard things like "the time is not right for going so far" and "one has to be realistic" and "one has to make one step after the other". But I see a risk if we create something like a mini EPPO: I see the risk that this raise has very high expectations and then the results are quiet poor. So if we don't want to go for a real European Public Prosecutor, then perhaps it will be better to simply make just another really small step that is elaborating more on Euro-just. But I don't want to conclude that this is the solution: the solution is a real European Public Prosecutor.

# Relationship between OLAF, the future EPPO, the other European Bodies and the national judicial authorities

*Check against delivery*

**John A. E. Vervaele**

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*After having highlighted the heterogeneity still present in the various national legal systems in the field of criminal procedure, the author focuses on the relationship between OLAF, the future European Public Prosecutor's Office (EPPO), other European offices (Eurojust, Europol) and national judicial authorities, taking into account the pertinent articles of the Treaty of Lisbon.*

When we deal with the European Public Prosecutor whatever the model might be and whatever the design might be - and there are still many in the air- we have to deal with main aspects, core aspects of criminal procedure. And criminal procedure dealing with use of powers that means definition of investigative acts and thresholds for the use of these acts; dealing with what in continental language is called "judicial authorities". So the agents that are empowered to use these acts and, directly related, the applicable safeguards; because there is no criminal procedure and there are no powers without safeguards. Otherwise, we're not in the rule of law, that's evident.

If we have a look at this field, even outside of the EPPO and with my experience already in the first Corpus Juris study - but also the last experience in the elaboration of what has been referred to as the Luxembourg model rules- the experience shows that still today in the legal order of the member States when it comes to the definition of investigative acts in national criminal procedure; when it comes to the design of the judicial authorities that might use them; and also when it comes to applicable safeguards, the situation in the member States is very different all over the Union. Some say the influence of the European Convention of Human Rights has been huge: and of course that's true, but not that much in this field. A lot on the trial; much less on the pretrial situation. So we have some approximation, but we cannot say that we have similar systems of criminal procedure, like in the United States. And you would even expect that, under the influence of some international public law (the Palermo Convention, the Cyber-crime Convention), all member States would have put in place very intrusive investigative acts, like infiltration, covered agents, interception of all type of telecommunications, the so-called new generation special investigation acts (SIT's). Also that is not the case: some Member States don't have them at all; other Mem-

ber States have some of them; the thresholds to use them are very different; and some Member States - that's even more astonishing- are using them in practice, based on general clauses, so without a clear and precise legal ground in the Code of Criminal Procedure or special statutes or acts. t. And I'm using this example because coercive investigative acts will, of course, be very important for the European Public Prosecutor. Because the idea is that the European Public Prosecutor has to deal with an area of serious offences. If he does not have coercive measures at his disposal, how should he deal with serious offences? So that's the picture we have, unfortunately. And we have to take that into account. And that's a general picture.

If we go now to the Lisbon Treaty, there are duties, there are "musts" and "mays": the EPPO is a "may", it's not a must. So we must not establish it: we may establish it as the legal basis for it. But there are also "musts" in the Treaty. Article 3 of the Treaty on the Union is laying down not only the legal basis and one of the main objectives of the Treaty of the Area Freedom, Security and Justice, but is imposing duties upon member States and upon European Institutions. The aim of realizing the Freedom, Security and Justice Area is a duty, it's a mandatory duty. Including SAP aims: security for the citizens and justice for the citizens. And then it comes to the instruments to realize that and the EPPO might be one. But we have to read it within the frame of the duties of article 3: so we cannot read it separately.

What else have we on criminal procedure, investigative acts and procedural safeguards? We have several options in the Treaty.

We have, of course, the basic option of article 82 of the Treaty on the Functioning of the EU, based on the codification of the mutual recognition scheme. In that article 82 TFEU we have also new legal bases for harmonization in the Area of Criminal procedure; harmonization of procedure legal safeguards, included. And, in my opinion, it's a little bit hidden, also harmonization of investigative acts. Why in my opinion? Because the Treaty gives a legal base to harmonize evidence, the use of the results of these investigative acts. So if you harmonize aspects of admissibility of evidence, it is very difficult to do so without harmonizing or approximating the gathering of the evidence: they are very much related. So Article 2 gives us a basis to approximate or harmonize the legal regimes in the Member States and to make them more equivalent also in the light of strengthening the co-operation under a mutual recognition scheme. Until now, we have adopted directives on the harmonization of certain procedural safeguards, but limited the Sweden Roadmap. That's already a lot, but that is not covering all the problems of applicable legal safeguards during the pre-trial investigation and prosecution. There are much more legal safeguards during pre-trial proceedings and investigative acts than the ones mentioned in the Swedish roadmap, that does not include procedural safeguards when gathering evidence through coercive investigative acts for instance and neither when it comes to admissibility of evidence. Neither the Commission, neither the Member States have submitted proposals to deal with procedural safeguards beyond the Swedish Roadmap.

The second option we have is of course Article 85 that says it's a coordination model, it's not the national model; we can strengthen that, the legal basis is there. Peter Csonka has said that there will be a proposal on the reform of Eurojust: however, I haven't heard much about it today concerning the substance. So I'm not so



sure if this will be a strengthening in the sense that it could be in line with the ambitions of the Treaty. This is not a full supranational model, because it's about coordination of prosecutor authorities between the States. So I see Article 86, of course, not the same as Article 82: it's not about harmonizing investigative acts at all. That's not the aim: therefore we have Article 82. It's not about harmonizing admissibility of evidence: therefore we have Article 82. It is not about strengthening coordination: therefore we have Article 85. It must be something else; otherwise, it wouldn't be there. Moreover, seen the demanding procedure to establish an EPPO under Article 86 (unanimity, approval of the parliament), it must be something exclusive with added value to Article 82 and Article 85; otherwise, it has no sense. So the philosophy of Article 86, in my eyes, is a philosophy (the word has been used, I don't have to invent it) of "direct enforcement". The opposite is, of course, indirect enforcement; that's the enforcement by the Member States, being it at a coordination model under Article 85 of the Eurojust or alone between them. Direct enforcement, in other words, contains supranational enforcement; and I think that's the main feature of article 86 and also the main distinction.

Does that mean, when you set up a European Public Prosecutor under a direct enforcement model being a supranational body dealing with investigation and prosecution, that it has nothing to do with the national level? That it is only supranational? No, not at all. Because I think it would be very unwise, seeing the experiences we have, not to insert, not to embed the European Public Prosecutor in the national legal regimes. So there must be – also the experience with OLAF - an interconnection. However, in my eyes, Article 86 excludes a model that would be fully national. As I said, it would be very strange to fit that in the Treaty. That's my first general point.

My second one is: when we go to classic Criminal Justice, classic Criminal Procedure, it's a chain of decisions opening a judicial investigation, investigating a case, gathering evidence, certain pre-trial decisions by prosecutors, by police authorities and by judges of course also; elaborating the charges, defining the indictment, go to Court, bring to judgment. All these separate acts form a chain and form a system: every Member State, as I said, have a system on that; they are very different, but they form a system. This system of building up a case and going through the chain of Criminal Justice must be in line with the human rights standards; and must be in line with the Rule of Law.

And I'm insisting on this chain because the European Court of Human Rights is imposing fair trial standards *inter alia*. To what? To the proceedings as a "whole" (the wordings of the Court). And the proceedings as a whole do not start at the trial Court. They start when the case is opened. That means that the applicable fair trial standards from the European Court of Human Rights do apply from the opening of the case (mostly be a police interrogation) until the final decision .

Second: I think any system of criminal procedure needs certainty and clarity; needs *lex certa*: not only a substantive law, but also a procedural law. In some countries, including mine, we speak about procedure legality in criminal matters; and we have it written in a Criminal Code and a Code of Criminal Procedure. But even if we don't have it, it can be a general principle of course. Why is this so important? It's important for the investigative and prosecutor authorities: that they

know, on a preset legal base, which powers they can use under which are conditions. It's very important for the Rule of Law, but also for the applicable procedure safeguards that the criminal procedure must be preset. So at least a suspect must know on beforehand; and in which situation he has which rights.

Why am I insisting on that? The Treaty in the Article 86 imposes a hybrid system; in the sense that the trial phase would be national; and the pre-trial phase (in my eyes direct enforcement) would be supranational, but, as I said, also embedded in a national system. That's something we have to take as it is, it is a choice of the legislator: a lot of people have criticized it, but that's a legislative job. Of course it's important that the link between the two is also settled by law, previously and clearly. And the link is the choice of the forum: when the prosecutor is bringing to judgment, he has to choose a forum that means a jurisdiction of another Member State's. This must be clear and preset: there must be rules for that and there must be a legal remedy, but I will not deal with that.

The problem with some of proposals that I have heard is that the complexity of the applicable law during the pre-trial phase can be quite big. The opening of an investigation would be a European decision. Most of the investigative acts – at least what I've heard this afternoon, coercive investigative acts- would apply under national law. In some complex cases that might be many national laws. Then the decision to charge, a decision to write an indictment, if understood it well, would be European again; and also a decision to bring to the Court; and then the trial would be national again. At a first view, this is extremely complex and can put under pressure what I said "procedural legality": a clear regime that is necessary in order to have a clear view on the investigative acts that can be applied and also the requirements, the thresholds, and the applicable procedural safeguards.

Why am I insisting on that? Because we have experience, already today, with the mutual recognition regime, with the MLA regime, with the Joint Investigation Teams that, putting together pieces of evidence that have been gathered in different legal regimes, lead to problems at courts; and lead to inadmissibility of gathered evidence. And you can say, of course, that's very nice: we are living under the Rule of Law and under the Convention of the Human Rights and so illegal the evidence is declared inadmissible. It's not nice at all! Because that means that we are not able to establish a system; or we have not been able to establish a system in which we can guarantee applicability of legal safeguards and efficiency. And that's the two things that we have to put together in order to deal with Article 3 of the Treaty.

The Law Enforcement Community at a European and a national level: I think they're all in the empowerment of the national law enforcement community; and the European law enforcement community depends a lot on the design of the EPPO itself: the more you make it national - in the sense that you do apply national applicable law- the less this European Law Enforcement Community can play an autonomous role. Of course they can play the role they have today; but nor the less they can play an autonomous role. The more you give to the European Public Prosecutor Office an autonomous supranational empowerment with applicable European Law, the more evident it becomes that this existing European Law Enforcement Community - and I am referring to Europol, to Eurojust and to OLAF- can have a substantive role within that: auxiliary agents, police judiciaire, whatever you might

label it, but we know what it means. So there it depends a lot on the design, I think.

The national law enforcement community: there we have several problems because of the very different designs of criminal investigation in the member States. And it starts already with the delegate EPP. In some of the EU Member States, the prosecutors are not investigating; they are only prosecuting. So who's your delegate? Is that a prosecutor that did not exist and just as a new agent in the national order? Or you're saying "no, we make a high police officer, the delegate"? That's a choice. Because he was dealing and he is dealing with criminal investigation; he is empowered under the national regime to do so. That's a decision that has to be made.

But then also the enchainment to the rest of the national law enforcement community; and the rest of the national law enforcement community here – I'm using the word "law enforcement community"- is very big and very specialized in this area. It's not only prosecutors and police authorities; and we're dealing in many countries with tax authorities having judicial powers; with customs having judicial powers or even other administrative bodies having judicial powers and playing a key role in this area. That means they must be in and connected to the system, whatever design might be. If they are not connected to the system of EPPO, forget about it. But the strongholds are there. Does it mean because of the fact that the strongholds are there? That you must apply and can apply only national law? I don't think so: it's perfectly thinkable that they apply in these cases European Law as a long arm of this Delegate EPP. That's possible. It's a choice; that's a political choice that has to be made.

Final remark: the judicial authorities and the judicial control. That's a very difficult one and also in this study of the Luxembourg Group that you can find the results on Internet. We had also quite a lot of problems with this one. Why is it a difficult one? Because there are constraints under the Lisbon Treaty. We, both academics and legislators are not completely free: they have to elaborate something in the frame of the Treaty. And there are also some doubts about some articles of the Treaty. But I think it's quite sure that some decisions – that might be decisions to use certain investigative acts (coercive ones); might be decisions to go to courts; that might be decisions about the choice of the forum (and we have of course parallels to certain decisions of OLAF; parallels to certain decisions of the competition authorities and so on), and based on *acquis* in the case law of the European Court of Justice- are challengeable and must be challengeable before the European judiciary. We cannot put away everything to the national level. Otherwise, we would undermine existing competences of the European Court. Which ones and which ones not? There starts a debate. That's problem number one.

Problem number two is that we are not dealing, as have been said rightly, only with *ex post* control (so judicial review): we are dealing also with *ex ante* authorization. And this area is extremely important. And is mandatory only already by the case law of European Court of Human Rights. Ideal would be, as Fritz Zeder has said, to put all that in a pre-trial Chamber and so on. That's of course a very nice design; it would be very good for the coherence, but I'm afraid that this Chamber would be very far away from daily reality. If you see the possible competence of the EPPO and the decisions that must be taken by a judge or a court in the pre-trial setting, could be quite a lot of decisions; and they must mostly be taken in a very

short period of time because it has to deal with civil liberties, but it can also be an arrest; but can be also freezing orders so there are many things that are really under a time of setting.

Second, you must know the field, you must not be too far away from reality. So I think that there it would be better in my eyes to impose a system of *ex ante* authorization at a national level; a system that does exist already for certain decisions in the competition area. It can be searches or site inspections of corporate bodies in the member States; or searches of homes of CEO's in competition cases: there a national judge is authorizing the competition authorities, to get in and to use the coercive powers. It's not the European Court of Justice. The difference with the competition area would be at least in the design that we have elaborated in the Luxembourg Group: that this national decision of the judge (judge of liberties if you want), authorizing *ex ante* a coercive measure of a European Public Prosecutor, would have value European wide: so it would be a warrant with EU wide reach and validity. You can compare it to the mutual recognition scheme without using it; we you don't use it here because there are competences for the whole European territoriality.

I don't believe that it is possible to realize – but that's of course my personal opinion- the objectives and the obligations in the Article 3 of the Treaty of Lisbon so related to the area of Freedom and Security and Justice without a model that relates to European territoriality. The word is not used in the Treaty, it uses "common territory of the member States"; but we all know that behind this is also a notion, it's an old historical notion of *espace judiciaire*. So this European territoriality must be in (in one or in another way) plus national, plus national, plus national is not enough in my eyes to realize the objectives of Article 3. Second: we need direct enforcement powers, not only in competition, but also in other areas and PIF is only one. I do fully agree with some of the speakers saying that there might be a need. It's a need in other areas of serious transnational crimes in this common area. The choice of the legislator has been other one but I think it is a very unfortunate choice. Third and last: European territoriality: direct enforcement, but including powers at a supranational level. So when I hear that the coercive powers, that should be used in these cases, depend only and lonely on national Law, I'm afraid then there is a threshold that is not met to realize Article 3.

# Distribution of competences, judicial review, relations with other offices and with national authorities: discussion points for future negotiations on the proposal for a regulation establishing a European Public Prosecutor's Office

*Check against delivery*

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*The author focuses on a number of issues relating to the proposal for a regulation establishing the European Public Prosecutor's Office (EPPO), which will be the subject of negotiations in the Council of the European Union. Among these, the author points out the need for clear and predetermined rules on the distribution of powers, the referral of certain EPPO actions to the Court of Justice, the relationship between the EPPO and Eurojust, mandatory/discretionary prosecution (Prosecution Policy), the relationship between the EPPO and national authorities and between the EPPO and its national delegates.*

I shall be speaking in an exclusively personal capacity. And I say this for once without that touch of impertinence which as a *discussant*, to quote Ezio Perillo, would have allowed me to sit back and listen, waiting for the others to finish what they had to say and then coming up with some mischievous remark to try to show that I had understood something. But this time I feel bit concerned and I am here as a “*absorbent*” rather than a discussant.

Currently I work at the General Directorate of Criminal Justice at the Ministry of Justice, which is in charge of formulating technically Italy's position on all European Union criminal law dossiers. Minister Cancellieri described this as a top priority for our Country now, in the first discussion phase, and in the future, when Italy takes over the Presidency of the Council of the European Union, which, due to a series of technical junctures, will probably be one of the busiest as concerns the dossier of the European Public Prosecutor's Office.

So I am here to absorb as many observations as possible and report them back to the office, so as to channel them into the formation of an Italian position that is as consistent as possible with the other dossiers; such as, for example, the positions taken hitherto on the dossier regarding the Directive on the protection of EU financial interests by means of criminal law (“PIF”). On this point, I should mention

that our position is fully consistent with the observations made so far, more or less by everybody, about the unsatisfactory nature of the current outcome of the discussions in the Council on the PIF dossier. With regard to the “petrol” mentioned by Andrea Venegoni, I must say here that there is neither petrol nor any other type of fuel. In fact, we are very eager to begin negotiations with the European Parliament on the Directive, to see if the different sensitivities present in Parliament will help to review some outcomes. And of course we are very eager to start working on the EPPO proposal.

One thing that has caused me some apprehension was to hear Peter Csonka speaking of a “double proposal” for EPPO and Eurojust. I sincerely hope these will be made in separate documents because just the thought of conducting parallel negotiations is a nightmare. A single document would be a living hell, also from the procedural point of view. I hope, then, that we are talking about two ideas that are moving in the same direction and that the proposals do not contain any mutual vetoes, given that we already have quite enough problems even before we start.

From the procedural point of view and after listening to the words of John Vervaele, it seems to me that the procedure laid down in Article 86 TFEU (the one about the European Public Prosecutor’s Office, EPPO) is curiously similar, except for the enhanced cooperation, to that for the EU’s accession to the European Convention on Human Rights, which highlights its constituent aspect. And I think in this regard the establishment of the EPPO is exactly like the accession of the European Union to the European Convention on Human Rights. They both require unanimity and the consent of the European Parliament. It may be a coincidence but, in my opinion, the two procedures are similar in value.

What have I learnt from today’s discussions? As we may have gathered from Minister Cancellieri’s speech yesterday, in Italy there are fundamental “limits” in this sphere. The first is that the European Public Prosecutor’s Office must be completely rooted to the founding rules of the Union and, especially as regards the creation of an area of freedom, security and justice, to fundamental rights. Thus the EPPO must fit into this scheme of things without exception and without falling into the temptation of efficientism. Efficientism no, but efficiency yes. That the EPPO should achieve better results than those we have at present is the least we should expect, because otherwise we should save ourselves the effort.

In my opinion, there is another element that emerges from the Minister’s words, namely that the EPPO has to contribute, as an element of cohesion, to the creation of a truly European area precisely because it is responsible for the protection of the common good of all citizens of the European Union. However, if this is to be so, if it is to act as a catalyst for the creation of a truly European citizenship, the EPPO must have a high degree of credibility. So we have to think of solutions for the EPPO that can give it not only the greatest possible efficiency but also the highest degree of credibility.

As for the first, I cannot but concur with the words of Vladimir Zagrebelsky, as read by Elena Paciotti, and those of John Vervaele. I believe it is essential to set rules for the assignment of jurisdiction. I shall no longer call it jurisdiction because we talked of a unitary EPPO area. I shall call it competence in the sense that within the same jurisdiction there must be a division of competences among different

judges all equally part of the jurisdiction. The rules must be watertight, rules in which the distribution of competences among the judges must not be based on the criteria of greater reliability, greater speed or desirability of the final result. It is absolutely essential for EPPO credibility, in my view, that there be no question of “forum shopping”, that we do not give the impression that the EPPO can choose one judge rather than another “à la carte” when requiring a precautionary measure, or more severe punishment, or the possibility of collecting evidence on a freer basis rather than according to more stringent rules.

It is essential that there be a very high level of protection of fundamental rights, especially the procedural rights of persons subjected to EPPO action. Here I have a doubt: the reference made by Peter Csonka about the list of procedural rights already subject to measures of approximation on the basis of Article 82, paragraph 2, of the TFEU. It is certainly very interesting and the connection with EU *acquis* certainly seems to me an indisputable fact. However, since all measures in this regard are “approximation” directives, they do not impose a single standard but are to be interpreted by each system. As for the EPPO, if we wish to ensure a consistent level of guarantees, precise rules must be set at the EU level. Can we establish a EPPO with a high level of guarantees, one which acts at both the central level and in national jurisdictions according to procedural rules full of guarantees, creating a first class and second class system of criminal procedure in member States where different legal proceedings have to comply with different standards of protection of fundamental rights? This could give rise to problems. It could also pose the problem of respect for the principle of equal treatment at national level.

Then there is jurisdictional control. I completely agree with John Vervaele. Article 263 of the Treaty is clear when it states that certain acts that directly affect the subjective position of the person subjected to EPPO action can be contested before the Court of Justice. This obviously cannot be limited without impinging on the powers of the Court as laid down by the Treaty. The problem could then emerge, and the hypothesis put forward by Ezio Perillo is fascinating, of an *ad hoc* court. However, I think there would definitely be potential problems with the contemporary action of two different systems of protection: one at the central level the other at national level, with powers that are not necessarily coherently divided (in the sense that one does not necessarily intervene at one stage while the other operates at the next stage or a different or more important stage).

This raises another doubt, precisely in relation to the European Union’s accession to the ECHR. The timelines for accession to the ECHR and the establishment of the EPPO may not be dissimilar. In April of this year, a preliminary agreement was reached on accession to the ECHR. Therefore, we can say that the two processes are moving in parallel. I think that among the many areas of European Union action, the EPPO will be a source of very considerable ECHR litigation. This seems inevitable: it is the European Union that acts directly in criminal dynamics, which is what produces most ECHR litigation. So, the European Union, too, will be subjected to the jurisdictional mechanism of the ECHR in this area.

Then, the problem comes up of having to read the structure of the rights of appeal which, by choice or by consequence of the existing treaties, will belong to the European Public Prosecutor’s Office, in the light of the need for this system of ap-

peal to be assessed by the ECHR in terms of effectiveness. In particular, I ask the following: if we give the national court *ex ante* control, it will surely be able to prevent harmful consequences to the EU's fundamental rights which would result from the single measure coming into effect (say a coercive investigative measure), but it certainly cannot annul an act of the European Public Prosecutor which in itself remains a valid measure, whose effects are not completely cancelled by its decision. Is this an effective appeal? I doubt it. I would not want the European Prosecutor's Office, having lost the chance, for example, to conduct an invasive search in one member state, to then turn to another jurisdiction, as part of the same action, which may well decide differently. From the point of view of Strasbourg, this would be extremely negative.

Let us not forget, among other things, that the problem of the assignment of competences arises also because, as regards the acts of the EPPO, after the European Union's accession to the European Convention of Human Rights, both the European Union and the member state in which the measure is actually carried out, either directly or indirectly through a national court, will be co-parties to a lawsuit, if the emerging outline for EU accession to the ECHR is confirmed. So the division of competences will be important - the division of competences between the central EPPO and national EPPO - also to assess the possible outcome of an appeal to the ECHR.

Let us move on from the EPPO and the rule of law in general to the EPPO and other institutions. I totally agree with Francesco Lo Voi on the need for close relations between EPPO and Eurojust. It will have a whole range of tasks that are immediately operational and already included in Eurojust's mandate for carrying out investigations and strengthening cooperation. This cannot be done with soft law; it cannot be done with easily circumvented protocols. We have to find an institutional balance between these two agencies.

In addition, there is the question of "Prosecution Policy", which Peter Csonka mentioned this morning. As an Italian, I feel a touch of apprehension when I hear this expression. However, since I am willing to learn from the experiences of others, and as I think there may be more than one viable way of getting effective solutions, I shall look at the problem dialectically. If, as in Italy, we give up *a priori* on the idea of imposing the mandatory exercise of criminal prosecutions on a future European Public Prosecutor's Office, we may also consider the possibility of a "Policy". This is part of a system that is absolutely legitimate, which, though, must be rooted in a system of guarantees. Namely, the alternative is not only between mandatory and opportuneness of prosecution; both must be accompanied by a series of systemic guarantees. So if we speak of opportuneness, we also speak of the systemic guarantees that accompany this principle, namely transparent decision making, justiciable choices or, at least, the presence of a subsidiary mechanism to ensure that if the choice is to not prosecute there is an alternative. It is an accountability mechanism of those that make the political decision. It is a political choice. All is legitimate: we just have to decide what are able to do. I think that it is a different thing to appoint a European Public Prosecutor, who has to answer politically for the choices made and criminal policy implemented, than a European Public Prosecutor, who instead answers to the criteria of strict legality.



Finally, EPPO and national authorities. A “Prosecution Policy” makes me think, for example, that there may still be, even with the establishment of exclusive EPPO jurisdiction over PIF offenses, space for the intervention of national jurisdictions. For example, if the EPPO gives up on a prosecution because of “Prosecution Policy”, national jurisdiction can be re-expanded to deal with the same facts in accordance with normal national criteria. I wonder if in this case (and I do not see a solution), regardless of the application of the *ne bis in idem* rules, national courts should use the same rules of jurisdiction applied in the initial choice made by the EPPO.

Finally, I do not see anything scandalous as regards the EPPO’s preliminary investigations *vis-à-vis* its national delegates, and the national delegates *vis-à-vis* national public prosecutors, provided that the introduction of a power of preliminary investigation is accompanied by systemic or other guarantees, as we mentioned before.

What is sure, at least from the Italian point of view, is that a certain amount of flexibility and creativity will be needed because nothing like this exists, not in the Italian system anyway, nor, I think, in any other system, at least in the way it is set out by the Commission. For our part, I would say that we are ready for an exercise in intellectual creativity that is imposed on us by the fact that this is a question of protecting not the assets of a single national community but the assets of a much wider community: all European citizens, even those from countries whose governments choose not to take part in the European Public Prosecutor’s Office.



IV session



The implication  
of the establishment  
of the EPPO in EU  
Member States



# Admissibility of evidence, judicial review of the actions of the European Public Prosecutor's Office and the protection of fundamental rights

*Text not revised by the author*

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*The author focuses on the different ways of interpreting legal concepts and the different investigative measures in Member States. She then highlights two aspects that are particularly problematic and which need to be addressed during the negotiations for the establishment of a European Public Prosecutor's Office (EPPO), namely the admissibility of evidence and the judicial review of decisions made by the EPPO.*

First of all, I really would like to thank to the Fondazione Basso for inviting me to this conference and giving me opportunity to share my view on the European Public Prosecutor (EPPO). I had the luck to be the member of the Working Group in Luxembourg which were devising model rules, and was mainly dealt with the issues which are related to the judicial control admissibility of evidence and some procedural rights. I'm also professor of Criminal Procedural Law so now when we are on the field of the criminal procedural law I can really have a kind of feeling that we are moving from the law of mutual legal assistance to the criminal procedural law as was said yesterday.

I also would hope that the proposal of the Commission, which will soon come, will not lead us on the way to protect our fundamental procedural rights from the future EPPO, but to protect in the criminal proceedings of the EPPO. So I'll certainly give some view on this very important issue and from the constitutional value for the Member States; there are also influences with the creation law and our criminal proceedings. This aspect cannot be undermined. I will try not to repeat the issues which have been said many times: what the EPPO is going to be? What are the tasks of the EPPO? It is major break in this construction that the national law should apply from the moment of indictment and that the EU regulation should prescribe the pre-trial criminal proceedings.

What has been said also yesterday here is very important to know that actually European Convention of Human Rights has regulated many fair trial rights at a stage of trial. Pre-trial phase of the criminal proceedings was not so well regulated and is not so harmonized in the Member States of the European Union. In that sense, the regulation has even prescribed what part of the criminal proceedings should be regulated in this article 6 of the Treaty. So the performance of its functions, the rules of procedure applicable to its activity, is the admissibility of evi-

dence and judicial review of the procedural measures. So it was obviously clear from the previous research and the proposals of the Commission regarding the EPPO which stands from the *Corpus juris* more than 15 years ago and from Green Book (from 2001) that the issue of admissibility of evidence is the crucial one in order that the EPPO can succeed; and, probably, the most difficult one. It has followed actually one of the saying that “where is the prosecutor there must be the Court” despite the indubitable value of the independence of the prosecutor.

All these issues however are very interconnected. When we are devising one investigating measure, we have to take into account the judicial control, whether it is ordered by the Court, ordered by the prosecutor, whether we have some kind of the judicial control afterwards; and also the admissibility of the result of these measures is something what we have to take into account. However, the Treaty is giving us no further guidelines and so it has left undecided many questions, so the European Commission has a huge task in devising of these rules which probably must be much more in detail than it was the Green Book or maybe some model rules; it must be in some way applicable pre-trial proceedings and we know how the criminal procedure is very complex.

As concerns judicial control, we all know that in criminal proceedings the European standard that we have judicial control or judicial procedures from the moment of indictment; so in all European States indictment has to go to the judicial control and the trial is running in front of the Court. So this is not a so problematic path, but it is not what should be regulated by the regulation. The problem is with the pre-trial settings. And the pre-trial settings are very various in the Member States as regard judicial control. Here we have the States which have still judicial investigation so the investigative judge. There is no problem of judicial control because it is the judicial body who runs the investigation. Then we have a State where there is no judicial control of the prosecutorial function of the prosecutor, like in Germany. In Germany you have judicial control only of the investigative measure, but not on the decision whether you will prosecute or not. In many other countries there are really various solutions to these problems, to the lower and the higher extent of the judicial control. This pose, of course, very great problems and open issues: how and what extent of the judicial control should exist for the European Public Prosecutor? Judicial control is certainly in international human rights standards; it is a part of the democratic society and the rule of law; and the criminal proceedings measures are exactly that these measures should be controlled by the Court. One should also mention that we cannot compare judicial control in the cooperation proceedings; so mutual legal assistance and mutual recognition which we have developed in European Union - for example, in the European Arrest Warrant and other instruments - have different standards of judicial control than in criminal proceedings. Just to say that the fair trial principle does not apply to these proceedings, so the art. 6 of the European Convention of Human Rights does not apply to the mutual assistance proceedings, but does apply to the criminal proceedings.

I really would like to make the warning that we have actually a very ambiguous meaning of the word “judicial”. It is not so simple today to define, as it today has different meanings depending on the expression or even the context in which is used. We have two main meanings of the word “judicial”. The first marrow

meaning can be found in common law countries, Anglo-American jurisdiction and Human Rights law. There the judicial applies only to judge, to the Court; so there for European Court of Human Rights, for European Convention of Human Rights the word “judicial” (like judicial power, judicial authority, judicial guarantee, judicial control) pertains only to the judges and Court. However, in the mutual legal assistance and in European Union law, “judicial” does not pertain only to the judge, but also to the Prosecutor authorities, Police, Ministry of Justice, administrative authorities and so on. So I would like to say that now this confusion actually that is very unfortunate that in the legal documents the UE is using English legal terms inconsistently with their meaning in the legal system of the English speaking countries like United Kingdom and U.S.A.; and also that this confusion can be tolerated in the context of the mutual legal assistance and the mutual recognition instruments, but not when we are back on the field of the criminal procedure. There, the judicial has to refer only to the Court in the sense of the art. 5 and art. 6 of the European Convention of Human Rights.

There are many types of judicial control of the prosecutor: it can be *ex post* or *ex ante* control; it can be some kind of review or order. I will say something about the judicial control of investigative function, what means the control of every investigative measure or every course of investigating measure; and the judicial control of the prosecutorial function where we don't have actually the consensus in the European Union on that function. In any case, the regulation of the EPPO has to set a border line between the prosecutorial and judicial powers in the pre-trial. That's one of the main tasks of the regulation and it's not so easy because border line is very different in the Member States.

From the point of view of judicial control of investigating measures, there are three types of measures that can be seen. The first one is on the Prosecutor discretion; so these measures are those that are not so much impinging on the human rights like summons, for example, or collecting data or questioning of accused or witnesses.

Then we have the other type of investigating measure which is ordered by the Prosecutor, but then subject to the judicial control. This is the most challenging category: in this category, although we have some decisions of the European Court of Human Rights, the Member States vary a lot, the measures which are in this part are, for example, compulsory appearance, arrest, identification measures (such as taking photos, fingerprints on biometric samples); line up, inspection in ceiling of means of transportation, seizure of documents and objects; tracking and tracing, control or supervised deliveries). It is maybe interesting to see that in the Green Paper from 2001 even house searches, freezing of assets and interception of communication it was possible to be ordered by the Prosecutor; and then in 24 hours to be again obligatory checked by the Court. This can be very problematic because in some States the measures like house searches, freezing of assets and interception of communication is only in the competence of the Court; and this is the constitutional issue, it's not only an issue of the criminal proceedings, but in many countries like in my country, the house search can be done only by the Court. So not by the Prosecutor, not even in the urgent situations.

In that count, I think that this is one of the point where the regulation has to take really high standards; and to follow the highest standards of the judicial control in this

type of measures. Otherwise, it can run counter to the constitutional and criminal procedural law of the Member States that require mandatory prior judicial authorization.

And the third kind of measures are the measures that are ordered by the Court. They are not problematic except that in some States we have exceptions in the urgent situation. So in the urgent situation some of these measures that I have mentioned already (like, for example, house search) can be ordered by the Court. It's also the question whether there are some measures like physical examination, taking DNA samples, physical psychiatric examination that should never be ordered in any case by even for an urgency situation by the Prosecutor.

One measure which is under the discussion, for example, is the search of business promises. Whether the search of business promises should be ordered by the judge, like in some of the countries, but we have some country which this can be ordered by the Prosecutor. The European Court of Human Rights also gives protection of the privacy of the legal persons according to article 8; but not the same as by the house searches. However if we choose that it can be ordered by the EPPO, this will follow certainly by the Law ring level of protection in some of the countries where these measures can be ordered only by the Court. One of the issue (and we have run to that issue also in the working group on the model rules) is whether the regulation has to prescribe exhaustible or only some of the measures; due to the legality principle, which was mentioned by John Vervaele yesterday, Procedure legality. Due to the effectiveness of the EPPO and also to the admissibility of the evidence, we actually take the decision that the EPPO and the regulation has to prescribe exhaustive list of investigative measures. It is unification then of this kind of measure within the European Union for the EPPO. However, this can lead also to the introduction of new coercive measures that didn't exist before in the Member States. Which is also like the more repressive side of the EPPO.

Now I will go on the issue of the admissibility of evidence which is certainly one of the most difficult issues. If we managed to solve the admissibility of evidence of the EPPO, I think that the EPPO will succeed. Because admissibility of evidence is one field which is very different in the Member States. Member States have different rules on admissibility of evidence and the rules which are set up by the European Court of Human Rights are actually quite low on this issue. The European Court of Human Rights has said that this field of National Courts; so the National Courts are the one who should decide on the admissibility of evidence. This is why it is so different in the European Union. However, they have exclusionary rule, but only very narrow. Only as concerns torture; so the only evidence which, according to the European Court of Human Rights, should be excluded from the criminal proceedings without the principle of proportionality, without the possibility of using it, although it can be the most important evidence, is the evidence which has been collected by torture.

The other jurisdiction of the European Court of Human Rights has developed what is the influence on the fairness of the trial has regarded the defense rights and the breach of some other articles of the Convention (like Article 8 which talks about the privacy). In these cases, the Court has said that it can be that this illegal evidence which, bridge the right of privacy or defense right, can render the proceedings unfair as a whole. So it's not automatically, but it must render the pro-



ceedings as a whole unfair. And the European Court has said that we have to have the defendant has to have the right to challenge the legality of evidence that is something what is necessary. So in any criminal proceedings we have to give the right of the defendants to challenge the use and the legality and then the Court can decide about it. But they have to have this legal remedy. One other rule is the rule on sole and decisive evidence: it is the legal evidence, if the sole evidence or decisive, then this can render the proceedings as a whole, as unfair. So, the national rules are very different. There are Member States which have illegal evidence decided *ex lege*, so prescribed very detailly in the criminal proceedings what should be excluded from the file. There are some States which don't have so much prescribing the law but decide *ex iudicio*, what means that the Court or the judge decides depending on the violation and on the importance of this evidence. And the aim of this exclusionary rule is also different. In some States, it should be excluded if it influences the unfair trial; in some other, only to prevent fraud or illegal action of the State authorities.

So what model should be for the admissibility taken by the EPPO? I can just present you some of the models. To see some of the models have been used also in the *Green Book*, in *Corpus Juris*, in our study, the first is model of mutual admissibility. This is the model which was taken in the *Green Book* and it says that if one evidence is taken in line with the national law it should be just accepted in another law. This has been shown as not acceptable solution; because you cannot just transfer evidence from one criminal proceeding to another criminal proceeding because they are so complex that if you do that, you would go against your procedural guarantees and maybe constitutional guarantees in your own country. It was very much criticized and this is maybe one of the reasons why the EPPO project couldn't go further on and there was no solution in the theory to this problem until now.

The other solution is exclusionary rule only in the cases of violation of the fair trial. This was the proposition of the *Corpus Juris* which said that the judge should exclude the illegal evidence only in the case where illegal evidence would undermine the fairness of the proceedings. However this is a very low standard and I think that this solution should be rejected. Introducing exclusionary rules only if illegal evidence would render the trial unfair as a whole, copying the assessment criteria of the European Court of Human Rights means the abolition of the national rules of admissibility of evidence and show, from my opinion, this respect for protection of human rights in the national legal orders. The National Criminal Courts are not Constitutional Courts or International Human Rights Courts: the former decides on the violation of the criminal procedural law and the latter on the violation of the criminal proceedings, preventing by exclusion of illegal evidence at any stage of the proceedings the violation of fundamental rights and unfair practices at trial.

The European Court of Human Rights decides when the criminal proceedings have been final on fairness of the prosecution as a whole. In certain stage of the proceedings it is not possible to estimate whether certain evidence would render the proceedings unfair as a whole, but the exclusion than prevents such result. Additionally, the aim of the exclusionary rule at the national level it is not only to preserve fair trial, but also to protect other fundamental human rights from arbitrary expression of the State authorities. Therefore, it is not acceptable to bypass rules

of National Criminal Procedural Law and prescribe exclusionary rule as a sanction to the authorities by a violation: its provision by proclaiming that the illusory rule can be used only if constitutional and convention rights to fair trial is violated. Such solution would undermine also why to public interest in preserving the integrity of the judicial process and values of civilized society founded on the rule of law. It also overvalues the interest of the effective persecution of the EU Fraud and the expense of violation of the basic human rights.

And the third solution is the mandatory admissibility which is also problematic. So any evidence that will be collected in line with the rules of the regulation should be accepted by the national judge. I think that this certainly can be the case because when the investigating authorities are taking these measures they have to follow the regulation. However, in certain cases you don't know whether the evidence is legal or not legal; if, for example, it can be decided only at a stage of trial. For example, the bit statements the European Court of Human Rights that says that the defendant has the right to interrogate the witness of the prosecution. In many countries, we have the solution that in the pre-trial stage of the proceedings, the prosecutor interrogates the witness alone so without the presence of the defense. I don't know what the regulation would be like, but in that case, if the witness is not again at the trial stage interrogated by the defendant, this statement cannot be used, according to European Court of Human Rights, in the judgment. So we have to give some discretion to the trial judge, whether to use or not to use the evidence collected by the EPPO.

And the third and last issue is judicial control of prosecutorial decisions. This is the most controversial one. As I said already, there are different solutions; even two opposite to solutions in the European Union. For example, I gave already the example of the Germany where you have no judicial control of the prosecutorial function of the prosecutor. And, for example, Austria where you will have also prosecutorial investigation, but with judicial control from the first moment of the pre-trial stage of the proceedings. And also we have countries with investigative judge where you have also judicial control. So the question is whether the decision of the prosecutor to open the investigation; to continue with the investigation and to close it should be under the judicial control or not. The European Court of Human Rights does not impose directly that must be judicial control, but it itself has already access the decision of the national court to open investigation and said "if there is no enough suspicion, you cannot open"; or if there is a suspicion to open an investigation or arrest someone. The other is decision not to prosecute: this is related to the effective investigation which is one of the positive obligations of the Member States related to the art. 238 of the European Convention. So if you don't prosecute, you can also violate European Convention of Human Rights. Also the European Court of Justice, if you remember this "mais scandal" in 1989 where the Greek authorities were also condemned by the European Court of Justice because they didn't open criminal investigation in the case of frauds against the financial interests of European Union. In line with what I have suggested (that the EPPO should follow the higher standards of the protection of human rights), I think that the decision of the EPPO should be also under the judicial control.

# The development of the Area of Freedom, Security and Justice in criminal matters and the continuing difficulties affecting investigative procedures involving several Member States

*Text not revised by the author*

## Akos Farkas

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*After underlining the achievements of the Area of Freedom, Security and Justice in the field of crime, the author focuses on the major difficulties encountered in investigations involving several Member States. One of the most problematic issues for the author is the collection of evidence and its use.*

It's my privilege to be a guest of the Fondazione Basso in the city of eternity.

In the last 16 years I participated on several conferences that were concerning the European Public Prosecutor (EPPO). Under these 16 years of work on the topic of European Law, lot of things have happened: a common definition of European Criminal Law was accepted; and new institutions (Europol, Eurojust, European Judicial Networking) in the field of criminal law cooperation were created. Now we are standing in front of the gate of creating the EPPO. The contours of legal and institutional panorama burst into sight as been pointed by some legal scholars the elements of this panorama and the system of Criminal law itself. We cannot yet see decisive elements of the system and the possible connections between the elements. What is clear is that new institutions will be taken up and they worked and will have begun and will have impact on the quality of cooperation among the EU Member States.

Previous legal frameworks (mutual recognition, *ne bis in idem*) are being applied in a new context; and lobby groups (think tanks) on the side of the EU are trying to hide the path of the European Criminal Law. The problem of the EU criminal lawyers is as well known. How can we clear up and investigate crimes and bring before the Court responsible criminals who have committed crimes having transnational character - we can say committed EU crimes? How can we improve the cooperation between State agencies and Courts in order to make their work more efficient? In this process, the investigation and the gathering of evidence play a particularly important role in transnational proceedings. Following, I would like to speak about this topic because I think all of the other topics concerning the

EPPO was quite clearly and detailed spoken and discussed by the presenters like Hans Nilsson, Peter Csonka, Fritz Zeder and John Vervaele which presentations have a quite detailed. And it was quite new for me that it was first time when the imaginations on the European Public Prosecutor was officially closed by an officer person. That is why I would like to speak about the most important path of the transnational and national criminal procedure of the investigation.

I'm not saying that there is doubt about the proposition that the gathering of information is one of the most important tasks of the criminal proceedings. However, such an assertion on the gains meaning within a system of relationship between offence, provision and answers to questions that are relevant to criminal responsibility, subject, of course, to procedural guarantees as well as human rights and justice considerations. This also only occurs if the acquisition of information is undertaken by investigating authorities or persons authorized to do so by law. The gathering of evidence is carried out by authorized bodies in accordance with the lawyer by, of course, human rights playing an important role and also the procedural safeguards. The effectiveness of criminal prosecution thus depends on the thorough gathering of information and evidence free from any uncertainty. The gathering of information fulfills this purpose to the same extent in each of the 27-28 national criminal justice systems.

We must therefore ask ourselves how these investigatory and evidentiary system which have more or less unified European, historical and cultural rules; but also have strong national characteristics and traditions as well distinct terminology and linguistic features can be brought together. The breaching of differences in terms of culture, language and institutional structures is no easy task; even in the case of two or more States. However, the problems that arise out of different linguistic systems, doctrinal systems and chronological approaches – as can be seen, for example, in the case of the *Corpus Juris* European, now in the EPPO too – and a number of agreements are virtually impossible to resolve. Mutual trust is the basis of cooperation among the EU Member States. However, trust concerning another State's constitutional systems and its operation according to the rule of law remains imperfect despite all force made. As a result of the defense of the criminal law as bulwark of sovereignty, there continues to be a lack of mutual trust. This is turned the chances to harmonize the law. It is urgently necessary however to find new ways of cooperating more effectively than has been the case in the past. One way is the mutual recognition model which is the official model of the EU in criminal matters.

Another form of cooperation was presented 7 years ago as a result of a research project and also was presented last year in Luxembourg. These models (the harmonization of legal institutional assistance as well as mutual recognition) play here a subordinated role.

The mutual recognition was formulated by the Tampere Council of 1999 as a cornerstone principle for cooperation in civil and criminal matters. Mutual recognition is not a completely new concept in international cooperation: traditional mutual assistance also recognizes the decisions of others. However, dimensions are different; and unlike European Union, mutual recognition requests States cannot execute a foreign decision directly without transformation. Various conventions of the Council of Europe on the transfer of execution of judgment create

possibilities of executing foreign sentences after conviction by the judgment, by the sentencing state to the decision of the administering State. The 1983 Convention on the Transfer of Sentenced Persons created two models of recommendation. The first is the conversion of the sentence following procedures of the administering State. The second, which comes very close to the mutual recognition as applied in the Union Law, is to continue the enforcement of sentence of sentencing State, despite its status as one of the cornerstones of the Area of Freedom, Security and Justice.

Since the Tampere Council in 1999 the concept of mutual recognition has not been officially defined: it is built up on mutual trust and mutual confidence as well as on an understanding that the rules of legal protection in other Member States are more or less at an equivalent level. The rule is there shall be mutual trust among the Member States.

A second check has two other all relevant conditions have been fulfilled is that regarded as a signal of distrust and he is as such unacceptable. This important identified that the meaning of mutual recognition is limited to recognition of formal acts in specific cases. In other words, the obligation to recognize a European Arrest Warrant, does not oblige, for example, Hungary to adopt the Dutch definition of crime into its national penal code. It only requires that for the purpose of the surrender of a person to the Netherlands, the difference is in substantive criminal law do not present an impediment to the surrender. Mutual recognition acknowledges are a sums of differences and allows them to exist; but rights these differences off as an impediment to cooperation. It unilaterally imposes a normative standard by Member States issuing the warrant order or license; the executing Member States may use a different definition of the offence or another criteria of suspicion. The authority competent to take the decision or collect the evidence might have an entirely different rules; however, these differences may not stand in the way of recognition.

Criminal cases with transnational character present two problems concerning evidence, obtaining evidence and using it once it has been obtained. The first of these problems is the international relations and various attempts at EU law making have addressed this problem. The second problem is of a national nature. The possible harmonization of evidence gathering raises several problems. One of them is that the criminal justice systems of the EU Member States differ as to what they permit the authorities to do by way of evidence gathering and the use to which the evidence may be put once it has been gathered. Some have argued that the European mutual recognition program is heading for dead-end; and that no further mutual recognition is practicable unless the Member States are prepared to harmonize the rules above the collection of evidence and its admissibility criminal proceedings. This problem also plays the role of the Lisbon Treaty; it attempts to solve the problem in Article 69- A paragraph 2 as follows to the extent necessary to facilitate mutual recognition of judgments and judicial decision and policing and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedural, concern mutual admissibility of evidence between Member States. The rights of individuals in criminal individual procedures; the rights also of victims of crime; any other specific aspects of

criminal procedure which the Council has identified in advance by decision for the adoption of such decision, the Council shall act unanimously after obtaining the consent of the European Parliament.

The selection of the investigating State does not solve the problem associated with the organization and technological operation of the investigation; or, if the investigation has been conducted on its behalf, the executing State must permit the carrying out of this investigation or carry them out on behalf of the investigating State. This is only possible if the executing State enables the application of the foreign law and assists by providing organization and logistic assistance. Permission to apply foreign law, which is based upon considerations of the Sovran State, presupposes knowledge of the law. In this context a problem of coordinating the supervision and oversight of the investigation must be solved. Where the authorities of the investigating State conduct an investigation in the executing State, then the legal rules of the investigating State generally apply. But how is this to be solved if the executing State conducts the investigation? Do the investigating authorities (Police or Prosecution), which are charged with supervising the investigation in the investigating state, have the right to direct the investigating authorities of the executing State? In this case, who is in charge of the investigating entity of the executing State? And what is the relation between the various individual directions that are giving respectively by the entity in charge in the investigating State and by that of the executing State?

So a further problem is to be found in the use of different languages. The alternative proposal deals with a question: in the relation to interpreters appointed by the interest of defendants even though language skills play a particularly center role when dealing with investigations involving more than two States. In an investigation conducted by the investigating State its language is the controlling one. Knowledge there is a fundamental requirement for communication among the joined investigating groups of the various executing States. Knowledge of the language of the executing State or of another common language is indispensable for effective cooperation. Yet what occurs in cases in which an investigation is conducted by the executing State.

How then are the rights of the investigating State to be secured? And how is the practical knowledge with regard to the investigation to be applied? Which language is the language of the investigation and which language is used to coordinate the investigation? In some countries this does not create any differences if the official languages are the same; in most Member States however the need for a strong understanding of the language and the law don't cause a direct problem. So there are some who consider the problem of knolling of the language and the law unimportant; or believe that it can be solved in a short-term. It must be stressed that the accuracy of the protocols of an investigation is of prime importance to the accuracy of findings concerning criminal liability; in fact, it is of greater importance than even the investigating States' decision to charge a suspect or the later admission of evidence at a trial. This is because the facts are communicated by means of language. If we find solutions to these problems, it may well be the question of the transfer of evidence can be answered easily; and evidence obtained by the executing State can also offer safeguards in the Courts of investigating States with the EU.

# The consequences of the establishment of the European Public Prosecutor's Office in EU Member States. The perspective of substantive criminal law

*Check against delivery*

**Rosaria Sicurella**

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*The author reflects on the inescapable requirements of respect for fundamental rights and the principles of certainty of law, legality and equality that the creation of the European Public Prosecutor should guarantee in carrying out its functions, criticizing the vagueness and ambiguity of the provisions contained in Article 86 of the Treaty on the Functioning of the European Union (TFEU). She also emphasizes the need for the adoption of a set of rules of substantive criminal law applicable by the European Public Prosecutor's Office to ensure it is fully effective. Finally, the author focuses on the proposal for a directive on the protection of financial interests, highlighting the problem areas and the ambitious goals.*

## INTRODUCTION

The heated debate currently taking place in Europe about the contents of the legislative act establishing a European Public Prosecutor's Office – in accordance with the provisions of Article 86 TFEU - is the unmistakable sign of a fundamental “change of pace” on this issue and of new ways of looking at the many complex questions linked to it. These are no longer seen as sterile speculations of interest only to the specialist but questions that have become part of both European and national political agendas.

It is, therefore, especially important - in the face of the ineluctable concreteness of the questions posed by the prospect of the establishment of such a body - to identify and carefully analyse all the consequences this would have on national legal systems at all levels: political-constitutional, legislative, and operational. In fact, the establishment of a European Public Prosecutor's Office - a supranational investigative body and a public office that acts to protect the financial interests of the European Union and bring cases before the corresponding national courts, and which to this end has incisive powers of investigation, the effects of which are extended to the whole area of the Union – will inevitably and significantly affect the competences of national investigative authorities. Moreover, it will also affect the underlying criteria used by different jurisdictions for the organization and the distribution of competences among the national authorities involved in the investigation phase (choices often tied to specific constitutional provisions), each choosing their own ‘model’ of

investigating judicial authority. Logically, these questions will have to deal with the key and politically sensitive issue of identifying the material law enforceable by this body, bearing in mind the possibly exclusive powers that could be conferred on the European Public Prosecutor's Office. This raises many questions about the need either for supranational legal paradigms (and, therefore, EU competence to adopt criminal laws that national courts can apply directly to individuals) or, alternatively, other options (obviously less ambitious) all of which substantially refer back to national legislation, albeit *Europeanized* in the sense that it derives from the application of European harmonization instruments. These issues are extremely complex and multifaceted, and for this reason should be carefully examined in order to understand all possible implications. Serious and unbiased reflection on the establishment of a European Public Prosecutor's Office can in no way be limited just to the increased effectiveness of criminal repression, a sort of 'ordinary' cost/benefit assessment, where the 'costs', which are not only purely economic but also 'political' (in the broad sense of achieving consensus and 'adapting' domestic regulatory and operational systems), would be balanced by an increased effectiveness in combatting criminal phenomena affecting European finances. Careful consideration should also be given to the impact this option would have on the European system as a whole, and particularly on fundamental rights, which would inevitably be 'exposed' to possible violations during investigations (in particular in criminal cases involving two or more states, which would, therefore, require judicial cooperation).

By looking at the establishment of the European Public Prosecutor's Office in the context of the broader issue of the protection of fundamental rights, we can analyse the many issues raised by such an office in their physiological multidimensionality, examining the repressive dimension but also the equally important – albeit often neglected or otherwise marginalized – guarantees offered by an authority intended to overcome (if properly implemented) the strong tension that has for some time characterized the current situation of judicial cooperation in criminal matters, in particular as concerns the principle of equality of European citizens.

The 'guarantees' approach has the further advantage of bringing to the fore the abovementioned complex and varied issues raised by the establishment of a European Public Prosecutor's Office. These issues are far from limited to strictly procedural consequences (regarding the investigation phase at national level and especially the relations between the European Public Prosecutor's Office and national investigation bodies). They inevitably also involve substantive criminal law, since it becomes necessary to identify the criminal law enforceable by such a body.

## THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE AND THE PROTECTION OF FUNDAMENTAL RIGHTS IN THE EUROPEAN UNION

The issue of the protection of fundamental rights, despite (often) being the target of a priori objections by the most vocal critics of European integration, has in fact been one of the two main 'drivers' of the process of European integration<sup>1</sup>, in

<sup>1</sup> As underlined some time ago by Mireille DELMAS-MARTY in many of her writings, among which we may mention (by way of example), *Les grands systèmes de politique criminelle*, Paris, 1992, especially p. 354 ff.



addition to the undoubtedly 'more obvious' dynamics triggered by economic union and the implementation of a single European market.

The supranational system has worked constantly to develop and formalize an autonomous system of protection of fundamental rights that would allow these principles to exert a function that both guides and checks the actions of the public powers of state. This can be traced back to the early seventies with the first significant rulings of the Court of Justice, then the first institutionalization of Article F2 of the Maastricht Treaty and the subsequent consecration of Article 7 TEU of the Treaty of Amsterdam (establishing an early form of political control of the Council over Member States), and finally the adoption of the "Charter of Fundamental Rights" of the European Union and the entry into force of the Lisbon Treaty, which explicitly affirmed the binding nature of the rights in Article 6 TEU<sup>2</sup>.

Originally, the judicial activity of the Court of Justice was conceived as being interpretive (or rather interpretative and creative), functional to the principle of the primacy of supranational law over national law – a principle that was difficult to uphold in the original situation of protection of fundamental rights in the Community system, which would have actually resulted in a regression even at the domestic level<sup>3</sup>. However, it produced by inference a catalogue of fundamental rights and has actually been indispensable for the completion of the supranational and legal system in a democratic sense<sup>4</sup>. It has also been an essential part of the process of empowerment of the Community legal system over the systems of Member States<sup>5</sup>. Described by many as almost a process of "constitutionalization", the gradual emancipation of Europe has necessitated the constant commitment of the Court of Justice in the construction of its legitimacy, through an interpretation of the treaties that was, at the same time, systematic, teleological and dynamic. Subsequently this gradually acquired the characteristics of "higher law", both cause and effect of an ongoing process, in which the recognition and adequate protection of

2 In this sense, see F. SUDRE – C.J. MONNET, "La Communauté européenne et les droits fondamentaux après le Traité d'Amsterdam: vers un nouveau système de protection des droits de l'homme?", *La Semaine juridique*, 1998, p. 9 ff. For an interesting analysis of the various dynamics that have determined the gradual definition and assertion of a European dimension of the protection of fundamental rights, cf. O. DE SCHUTTER, *Les droits fondamentaux dans le projet européen. Des limites à l'action des institutions à une politique des droits fondamentaux, in Une Constitution pour l'Europe. Réflexions sur les transformations du droit de l'Union européenne*, edited by O. DE SCHUTTER – P. NIHOUL, Brussels, 2004, p. 81 ff.

3 In particular, the gradual recognition of some of the constitutional principles enshrined in domestic legislations has avoided conflicts with the most demanding national systems (such as Italian and German); in this sense cf., among others, B. DE WITTE, "Community Law and National Constitutional Values", *Legal Issues of European Integration*, 1991, p. 1 ff., especially p. 22.

4 See F. CAPOTORTI, "Il diritto comunitario non scritto", *Diritto comunitario e degli scambi internazionali*, 1986, especially pp. 411-412. On the development of the protection of fundamental rights in the community system, see J. VERGÈS, *Droit fondamentaux de la personne et principes généraux du droit communautaire*, in *L'Europe et le droit, Mélanges en hommage à Jean Boulois*, Paris, 1991, p. 513 ff.; adde, A. CLAPHAM, *Human Rights and the European Community: A Critical Overview*, Baden-Baden, Nomos Verlagsgesellschaft, 1991, p. 29 ff.; G. GRASSO, "La protezione dei diritti fondamentali nell'ordinamento comunitario e i suoi riflessi sui sistemi penali degli Stati membri", *Rivista internazionale dei diritti dell'uomo*, 1991, p. 617 ff. and the bibliography therein; C. O' NEIL, "The European Court taking Rights Seriously?", *Common Market Law Review*, 1992, p. 669 ff.; G. TESAURO, "I diritti fondamentali nella giurisprudenza della Corte di Giustizia", *Rivista internazionale dei diritti dell'uomo*, 1992, p. 426 ff. For a summary of the case law of the Court of Justice on the subject, cf. ECJ 18 December 1997, *Daniele Annibaldi v. Sindaco del Comune di Guidonia e Presidente Regione Lazio*, case C-309/96, Racc. p. 7493, in particular paragraphs 12-13.

5 For a more extensive discussion of these questions, see R. SICURELLA, *Diritto penale e competenze dell'Unione europea. Linee guida di un sistema integrato di tutela dei beni giuridici sovranazionali e dei beni giuridici di interesse comune*, Milan, 2005, p. 402 ff.

fundamental rights is an absolutely indefectible part<sup>6</sup>.

It was logical, and not at all by chance, that the first institutionalization of the protection of fundamental rights in the EU should coincide with the first 'official' entry, through Maastricht, of criminal matters in the dynamics of European integration (albeit in forms and with tools - defined in Title VI of the Treaty, the so-called third pillar - totally different from the 'ordinary' ones of Community law), and that progressive developments in this sphere have taken place in parallel with the gradual extension of the competences of the Union, especially in criminal matters, through the provisions of the Treaty of Amsterdam and, albeit in a form that is less significant and innovative, of the Treaty of Nice. The developments outlined above culminated in the present day recognition of the EU's incisive competence in the approximation and harmonization of domestic penal systems enshrined in Articles 82 and 83 TFEU and, as concerns the Union's financial interests, article 325 TFEU (to which must be added the provisions regarding the strengthening of Eurojust (Article 85 TFEU) and, of course, the future establishment of a European Public Prosecutor's Office (Article 86 TFEU)), which is flanked by the provision in Article 6 TEU, which, apart from establishing the binding nature of the Charter of Fundamental Rights of the Union (establishing that the rights enshrined in it are to be used as an unambiguous criterion for judging the compatibility of provisions enacted both by European institutions and national institutions through the application of European instruments), also provides for the Union's accession to the European Convention on Human Rights.

The undisputed centrality of this dynamic can be clearly seen in the Stockholm Programme (entitled "An open and secure Europe serving and protecting citizens")<sup>7</sup>. The goals set out in the words of the title are described in accordance with the definition of a common geographic area characterized by the undisputed 'primacy' of the European citizen, no longer just a *homo economicus* (having rights and freedoms in the economic spheres of freedom of movement and exercise of economic activities) but a person, a perspective that is full of implications not only for single regulatory initiatives but also the essential characteristics of the European system, which cannot but be based on the principles of rule of law, civil rights and democracy.

No one can fail to see the variety and sensitivity of the issues that the prospect of the establishment of a European Public Prosecutor's Office is bound to raise

6 cf. J.L. DA CRUZ VILACA - N. PIÇARRA, "Y a-t-il des limites matérielles à la révision des traités instituant les Communautés européennes?", *Cahiers de droit européen*, 1993, p. 10. By way of illustration, in the context of the extensive bibliography on the subject, cf. A. CASSESE, "La costituzione europea", *Quaderni costituzionali*, 1991, p. 487 ff.; D. CURTIN, "The constitutional structure of the Union: a Europe of bits of pieces", *Common Market Law Review*, 1993, p. 17 ff.; O. DUE, *A Constitutional Court for the European Communities*, in *Constitutional Adjudication in European Community and National Law*, edited by D. CURTIN - D. O'KEEFE, Dublin 1993, p. 17 ff.; and in the same miscellany, cf. F.J. JACOBS, *Is the Court of Justice of the European Communities a Constitutional Court?*, p. 25 ff.; J.-P. JACQUÉ, *Cour général de droit communautaire*, in *Collected Courses of the Academy of European Law*, vol. I, 1990, p. 237 ff., especially pp. 256-317; G. MANCINI, "The making of a Constitution for Europe", *Common Market Law Review*, 1989, p. 595 ff.; J. MISHO, "Un rôle nouveau pour la Cour de Justice?", *Revue du Marché Commun*, 1990, p. 681 ff.; H. RASMUSSEN, *The Court of Justice of the European Communities and the process of integration*, in *Fédéralisme et Cours Suprêmes*, Bruxelles, 1991, p. 199 ff.; J. STEIN, "Lawyers, judges and the making of a transnational constitution", *The American Journal of International Law*, 1981, p. 1 ff.; J.H.H. WEILER, "The Transformation of Europe", *The Yale Law Journal*, 1991, p. 2403 ff.

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precisely in relation to the ineluctable demands of respect for fundamental rights. This concerns not only the rules regulating the European Public Prosecutor's powers of investigation (and the exercise of the same by judicial authorities) but also the rules delimiting the powers of the new office, and specifically the rules that identify the laws it may enforce. This issue calls into question not only the principles of legal certainty and legality but also the aforementioned principle of equality. The latter has been affected significantly by the continued presence of strongly differentiated repressive responses, even in legislation aimed at harmonization, primarily aimed at the protection of financial interests.

However, this principle is inevitably disregarded due to the significant differences about *if* and *how* to respond to criminal phenomena affecting common interests - and more specifically the supranational interests of the Union and, as such, should receive uniform protection throughout the European territory. Member States have different views on this, with inevitable and adverse consequences for effective actions to combat crime, due to phenomena such as *forum shopping*. This is by no means a remote possibility and is the rule in the criminal phenomenology typical of those affecting the financial interests of the Union. Would-be criminals look at the "risk of punishment" as part of their ordinary cost/benefit assessment before making the decision to carry out a crime.

It is an issue that is not only conceptually fundamental and indispensable but also politically 'loaded'. The answer to the question depends on the extent and strength of the powers given to the European Public Prosecutor's Office and, conversely, the 'erosion' this would cause to the competences of national authorities.

In this regard, doubts must be raised by the vagueness - if not the ambiguity (plausibly intentional) - in this regard of Article 86 TFEU, which says nothing about the determination of the laws that would be enforceable by the new Office, producing undesirable consequences not only in terms of the effectiveness and coherence of its actions but also in terms of civil rights guarantees.

### **CRIMINAL LAW ENFORCEABLE BY THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE: SILENCES AND AMBIGUITIES OF ARTICLE 86 TFEU.**

The political weakness of Article 86 TFEU is undeniable. Far from directly establishing a European Public Prosecutor's Office, it merely lays the necessary legal basis for a future and possibly unanimous decision of the Council (in the absence of which, a form of enhanced cooperation could be introduced on condition that at least nine Member States participate in it). We must say, however, that the Treaty does set out some basic choices of no little importance as regards not only the institutional and functional characteristics of the office but also its structural characteristics.

We shall intentionally omit from these brief considerations the many issues raised by the enigmatic expression used in Article 86 TFEU in relation to the establishment of such a body "from Eurojust" - an expression that was almost unanimously criticized for its heuristic inconsistency, but which provides an unequivocal and significant element as concerns the office's judicial (and not merely administrative) nature. We shall, though, take into careful consideration all the implications of the words chosen to define the powers of the European Public Prosecutor's

Office, which “shall be responsible for investigating, prosecuting and bringing to judgment, [...] the perpetrators of, and accomplices in, offences against the Union’s financial interests”, These words unequivocally point to some essential structural features of the future office. It will be qualitatively different from Eurojust, from whose rib it is supposed arise. It won’t (merely) be involved in cooperation but will have a truly supranational dimension (unquestionably involving ‘integration’). Thus, a ‘strong’ model has been chosen for the office, which will direct the entire investigation phase, since it will be directly and exclusively responsible for all the main functions of the pre-trial phase (not to be shared with other parties, such as the police, as happens in other jurisdictions such as the British).

However, there is nothing so stringent and decisive as regards the substantive law enforceable by the European Public Prosecutor’s Office.

On this point, we should make it clear that the weak point of the provision does not lie with the broad or rather generic terms used for the crimes within the competence of the European Public Prosecutor’s Office. It is to be found in what may be called the *core crimes* identified in Article 86 paragraph 2 TFEU as “crimes affecting the financial interests,” while paragraph 4 of the same article, raises the possibility of extending “the powers” of the European Prosecutor’s Office “to include serious crime having a cross-border dimension.” Given the essentially constitutional nature of the provisions of the Treaties, which lay down the structure, functions, and spheres of competence of the various authorities and institutions (with a view to defining the balances between them) but not the rules the latter are to apply in the exercise of their respective powers, the above-mentioned expressions can be considered to fulfil adequately the function of assigning and delimiting the competences that should be expected from the Treaty. This weakness is undoubtedly to be found in the provision of Article 86 paragraph Par 3 TFEU, which concerns the ‘necessary contents’ of the constitutive regulations of the Office – namely an act of so-called secondary legislation which provides detailed rules about the structure and organization of the new authority and also the exercise of its functions. It expressly mentions only the “Statute of the European Public Prosecutor’s Office,” the “conditions for the exercise of its functions”, the “rules of procedure applicable to its activities”, the “rules of admissibility of evidence” and the “rules applicable to the judicial review of procedural measures taken by the European Public Prosecutor’s Office in the exercise of its functions”. However, it says nothing about the typologies within the competence of the European office, nor does it suggest that the regulations will contain the definitions of the criminal acts within its competence, including, therefore, the definition of cross-border crimes that will be directly applied to individuals by the national criminal court before which the European investigative office exercises its powers of prosecution, thus ignoring the reference in paragraph 2 of Article 86 TFEU to the “offences against the Union’s financial interests, as determined by the regulation provided for in paragraph 1.” (which is the same regulation that sets the contents in paragraph 3 ), and consequently weakening - if not completely doing away with – any expectation of a legislative text establishing a sort of mini code for the protection of financial interests, determining not only the rules of procedure, but also the rules of substantive criminal law. This expectation, as will be pointed out below,

far from being unrealistic is both legitimate and, at least to some extent, well founded and logical for the coherence and effectiveness of the decision made to establish the office.

Silence is eloquent, in particular if Article 86 paragraph 3 TFEU is compared to the text European Commission proposed to the Intergovernmental Conference in Nice precisely for the purposes of introducing a specific provision, Article 280a of the EC Treaty (Article 280a) TEC), concerning the establishment of a European Public Prosecutor's Office. Although it mostly reiterated the same terms as regards the structural characteristics of the office as provided for today in Article 86 TFEU, this text contained an explicit reference to the use of secondary legislation to lay down "the common definitions of the offences and punishments", which would represent the material remit of the new European prosecution body<sup>8</sup>. In the face of such a 'serious' precedent, the silence of Article 86 paragraph 3 TFEU betrays the reluctance of the drafters of the Treaty to make explicit the *inevitable implications* of the creation of a European Public Prosecutor's Office (in terms of substantive criminal law). This sort of conclusion inevitably leads to serious concerns about the interpretation given by authoritative doctrine, according to which the reference in Article 86 paragraph 2 TFEU to offences "as determined by the regulation provided for in paragraph 1" represents the necessary legal basis for adoption – at the same time as the establishment of a European Public Prosecutor's Office – of a *corpus* of supranational common definitions of offences (and therefore a number of common definitions of offences that national courts can apply directly to individuals), to clarify the broad concept of "crimes affecting the financial interests of the Union", defining (in the full sense) the criminal law enforceable by the European Public Prosecutor's Office<sup>9</sup>.

This interpretation is perhaps favourably conditioned by the experience of the "*Corpus Juris*: introducing penal provisions for the purpose of protecting the financial interests of the European Union"<sup>10</sup>, a document known to all and which led to a debate lasting more than fifteen years on the need for a truly 'sectoral' European criminal law (i.e. limited to the sector of the protection of the financial in-

8 GU C 115, 4-5-2010.

9 This reading (though actually regarding the provisions of article III-274 of the Constitutional Treaty, which Article 86 TFEU faithfully follows) has been proposed, among others, by A. BERNARDI, "*Riserva di legge*" e fonti europee in materia penale, in *Annali dell'Università di Ferrara, Scienze giuridiche, Nuova Serie*, vol. XX, 2006, p. 5; S. MANACORDA, *Los estrechos caminos de un derecho penal de la Unión europea. Problemas y perspectivas de una competencia penal «directa» en el Proyecto de Tratado constitucional*, in *Criminalia*, 2004, p. 208 ff.; L. PICOTTI, *Il Corpus juris 2000. Profili di diritto penale sostanziale e prospettive di attuazione alla luce del progetto di Costituzione europea*, in *Il Corpus juris 2000. Nuova formulazione e prospettive di attuazione*, Padua, 2004, pp. 80 and 85-86.

In the sense that Article 86 TFEU provides for a regulation that only establishes standards of conduct (and any general provisions), while in terms of sanctions, in the absence of an explicit reference to the same in Article 86 TFEU, the Regulation could not in any case exceed the threshold in Article. 83 TFEU, being limited to the introduction of "minimum standards". Even though the "standards" may be very precise they have no direct effect, cf. C. SOTIS, *Le novità in tema di diritto penale europeo*, in *La nuova Europa dopo il Trattato di Lisbona*, edited by M. D'AMICO – P. BILANCIA, Milan, 2009, p. 156.

10 "*Corpus Juris*" portant dispositions pénales pour la protection des intérêts financiers de l'Union européenne, edited by DELMAS-MARTY, Parigi, 1997 (Italian translation, edited by R. SICURELLA, cf. *Verso uno spazio giudiziario europeo. Corpus Juris contenente disposizioni penali per la tutela degli interessi finanziari dell'Unione europea*, Milan, 1997). For the second (and last) version of the document (the so-called *Corpus Juris 2000*), cf. *La mise en œuvre du Corpus Juris dans les Etats membres*, edited by DELMAS-MARTY – VERVAELE, Antwerpen-Groningen-Oxford, Intersentia, 2000, vol. I (for the Italian translation by R. SICURELLA, cf. *Corpus Juris 2000. Un modello di tutela penale dei beni giuridici comunitari*, edited by GRASSO – SICURELLA, Milan, 2003, 195 ff.)

terests of Europe), and in which the planned creation of a European Public Prosecutor's Office (which in fact makes its first appearance in this document) is accompanied by a 'system' of European criminal law provisions concerning (both procedural and substantive in nature) crime in general and specific crimes.

However, such a systemic approach appears to have been abandoned. The "Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor"<sup>11</sup>, although following shortly after the publication of the *Corpus Juris* 2000 and largely inspired by the proposals therein, sees the establishment of the European Prosecutor and the introduction of common rules of substantive criminal and procedural law as largely independent matters, or at least not necessarily inseparable. The introduction of common supranational typologies, according to this document, is only one of the possible options, together with others based on a more or less close harmonization of national provisions.

In the light of these considerations, the prevailing impression of Article 86 TFEU is that it is only 'institutional' in nature; that is, it provides for the creation of a supra-national investigative authority, endowed with wide powers of investigation to be exercised throughout the EU (in forms and ways to be determined by a constitutive regulation, especially as regards its relations with national investigating authorities), 'strategically' eliminating the other 'unifying' components which formed a coherent systematic whole in the *Corpus Juris*. In particular, the determination of the sphere of competence - and more precisely the office's exact perimeter of action in terms of serious criminal behaviour - does not seem to be part of the 'necessary' contents of this regulation, and is seen as a question that could possibly be resolved outside the specific legislation regulating the new office. The combined reading of paragraphs 2 and 3 of Article 86 TFEU would, therefore, seem to point to a narrow interpretation of the term "determine", in the sense of a merely abstract provision of the competence of the European Public Prosecutor's Office, indicating the *nomen iuris* commonly attributed to certain conduct (a model that recurs in other European documents)<sup>12</sup>, or even just referring to other legal instruments which provide for the (more or less precise) description of behaviours considered to be detrimental to financial interests. Consequently, the definition of the law enforceable by the new office could be assigned (at least *prima facie*) to other 'sources', i.e. regulatory measures other than the aforementioned constitutive regulation, dependant on different rules and dynamics which could affect its adoption and especially its effectiveness in domestic legal systems. Obviously, the risk is that this sort of regulatory framework could lack coherency and adequacy for an authority that undoubtedly constitutes a 'novelty', which requires a constitutive regulation that is itself the 'natural source' of the law enforceable by the European Public Prosecutor's Office.

11 COM (2001) 715 final., cit.

12 See, for example, the Framework Decision 2002/584/JHA of 13 June 2002 "on the European arrest warrant and the surrender procedures between Member States (OJ L 190, 07.18.2002). Article 2 contains a list of offenses for which double criminality is excluded. It uses the expression "as defined" with reference to a simple indication of the names.

## CONCEPTUAL AND JURIDICAL NEED FOR A EUROPEAN CRIMINAL LAW OF “OFFENCES AFFECTING THE FINANCIAL INTERESTS OF THE EUROPEAN UNION”

In the face of the ambiguity of the words in Article 86 TFEU, the definitive conclusion about the indispensability or less of introducing common rules of substantive criminal law – as concerns the establishment of a European Public Prosecutor’s Office – cannot in any way be based solely on what is stated in that provision. More precisely, as regards the words in Article 86 TFEU we must highlight not only what is explicitly stated but also what is logically implied: namely the dynamics triggered by such an office would inevitably lead to the (possibly progressive) determination of supranational criminal laws (and thus a first nucleus of European criminal law). This is also supported by the (necessary) reading of such a provision in the overall context of the provisions of the Treaty, particularly the provisions on principles relating to the implementation of an area of Freedom, Security and Justice, as stated in Article 86 TFEU.

In effect, for reasons of the office’s efficiency (and therefore in terms of a functional assessment) and for reasons of overall legitimacy (in the broad sense, not mere formal legitimacy but a legitimacy based on the authoritativeness and credibility of the office and of the overall project underlying this authority), a set of rules of substantive criminal law would have to be adopted to determine the *criminal law* enforceable by the European Public Prosecutor’s Office.

If the centralization of the investigation and prosecution phases (in the sense of a decision to take action) were not to some extent homogenous, as regards the individual responsibility of the alleged perpetrators of these crimes and the consequences thereof (i.e. basically a homogenous punitive response), the ultimate purpose of effective protection of the financial interests would be defeated, because the alleged perpetrators could benefit from the significant existing differences in criminal laws, and could strategically choose to commit the offence in a way that avoids incurring in criminal sanctions or other severe consequences, in spite of the fact that a future European Public Prosecutor’s Office would have made it possible to identify such parties. What is more, the purpose of deterrence would consequently be defeated, too, a function pursued by the European (harmonization) legislation on criminal law measures for the protection of European financial interests (the so-called general preventive function of qualifying certain conduct as criminal offences). In general, though, it would be a defeat for the EU’s supranational interests par excellence – the attainment of the *common sense of justice*, as regards the Union’s financial interests, one of the primary goals of the EU’s initiatives in the implementation of an area of Freedom, Security and Justice. The continuation of significantly different regulatory scenarios for criminal phenomena prejudicial to the financial interests of the Union – that is, assets for which Member States have already been called on to protect at the level of criminal prosecution by means of convergence and harmonization – could create a situation of *cultural disorientation*. It would be impossible to achieve a substantial degree of convergence in the negative value judgments in the penalties implemented by the Member states, both as regards the behaviour to be subjected to punishment and the intensity and severity of the sanctions. It is a situation that is likely to under-

mine, globally, the congruity/rationality of repressive responses to forms of behaviour detrimental to supranational assets, by reason of the logical and necessary principle of equality of European citizens before the (national) law for the same wrongful conduct as regards a given supranational asset, a principle that is inevitably disregarded in an inhomogeneous regulatory environment such as we have today.

No one can fail to see, in the light of what has been briefly outlined above, the significant and realistic risk of delegitimizing a political decision to introduce a supranational investigative authority without any legislation concerning applicable law. Added to this, is the evident conceptual incongruity of the continuation of legislative heterogeneity despite the introduction of an investigative office exercising 'public' authority throughout the European Union to defend common/supranational interests which cannot but depend on a uniform assessment of criminal conducts and the sanctions to which they should be subjected.

However, beyond the *conceptual need* to determine a European criminal law to protect financial interests (albeit limited and sectoral), there is also a juridical need of the same. This is an essential condition, in the light of above arguments, if the European Public Prosecutor's Office is to be fully effective and functional, and if the common objective of creating an area of freedom, security and justice is to be fully implemented, of which the above office is a specific manifestation. More precisely, the establishment of a European Public Prosecutor's Office, now at the centre of the political debate, gives member states the choice of having at their disposal one the most significant 'tools' in the Treaty for the creation of a common area of freedom, security and justice, thus setting a 'new' course that marks a gradual but radical shift from the (now predominant) model of cooperation to one of deeper integration. Although the legislative formula adopted is indicative if not of hypocrisy at least a continuing reticence and lack of a solid and sufficiently widespread political will as to the ways and terms of implementing such an authority, the definitive solution cannot but involve additional basic choices by European lawmakers to ensure the full functionality and thus authoritativeness and credibility as a component connoting the area of freedom, security and justice, which constitutes, as we said, a "goal" of the Union and as such binding on all European initiatives (regulatory and non) relating to it.

If properly interpreted as a systemic regulation of the Treaty, and in particular the part of the Treaty devoted to the criminal dimension of the area of Freedom, Security and Justice (Chapter 4 of Title V), the function of the provision in Article 86 TFEU becomes clear (and, consequently, its perceptive scope can be reconstructed). With reference (first and foremost) to the specific field of the protection of financial interests, it sets a specific course - essentially different from and more incisive than the regulatory (directives for the approximation of criminal laws laid down in Articles 82 and 83 TFEU) and institutional tools (Eurojust, 'advanced' cooperation authority) provided for in most areas of EU competence. It is a course characterized, according to the regulatory provisions of Article 86 TFEU, by integration and supranationality, which, far from being circumscribed only to the institutional component, cannot but logically also characterize the "regulatory" component of the law enforceable by the European Public Prosecutor's Office.



Thus, apart from the need for unity in the law enforceable by the European Public Prosecutor's Office, at both logical-conceptual and juridical levels, it also means that the provision of Article 86 TFEU could be recognised as a *function of purpose* for all initiatives aimed at the protection of financial interests and which, logically, cannot but proceed in the direction of greater integration clearly prefigured in Article 86 TFEU.

## THE CONTENTS OF EUROPEAN CRIMINAL LAW FOR THE PROTECTION OF THE FINANCIAL INTERESTS OF THE EUROPEAN UNION

Although over a decade has elapsed since the publication of the "Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Public Prosecutor's Office", the results of the broad consultation launched by the Commission with the publication of this document - which involved not only academics and (European and national) institutional actors but also legal practitioners - summarized in the follow-up report published in 2003<sup>13</sup>, undoubtedly still represent an important starting point for the discussion of the fundamental question of the possible contents of a core group of supranational criminal provisions (limited to the field of the protection of European financial interests). But before illustrating the positions that emerged on that occasion, we must underline one essential and absolutely significant aspect: the unanimous criticism of the inadequacy of the regulatory framework (then) existing, which, if established, would end up 'weakening' an authority with strong powers of investigation (significantly reducing any advantages it may have over the current situation of judicial cooperation in criminal matters, and, in this way, undermining its *raison d'être*). Thus, while recognizing the (mostly but not only political) difficulty of conceiving the complete 'unification' of the provisions of substantive criminal law for the protection of European financial interests - a solution which, in the wake of the proposals of the *Corpus Juris*, would basically lead to a mini code of rules of (procedural and substantive) criminal law to establish a sort of 'comprehensive' discipline (different from national rules) to be applied in all cases falling within the jurisdiction of the European Public Prosecutor's Office - the above-mentioned follow-up report shows there is broad consensus on a solution that could be defined as a half way measure: the adoption of a number of common criminal laws (more precisely of supranational precepts) which, in accordance with the general principle of subsidiarity, would be strictly limited to aspects and matters deemed "strictly necessary" for the action of the European Public Prosecutor's Office. The report also shows that, according to the outcomes of the consultation, the aspects and matters deemed "necessary", in accordance with the principle of legality (an established fundamental right of the Union), include not only applicable typologies (fraud, corruption and money laundering - the inseparable triad of Union action in the field of protection of financial interests) but also crimes related to them, such as fraud in procurements or offences committed by European or national public officials managing EU funds, such as abuse of office), and, in accordance with the same principle of legality and the prin-

13 COM (2003) 128 final.

ciple of proportionality, the sanctions they should be subjected to. With regard to the latter, criticism has been levelled at the lack of harmonization produced by the instruments adopted in this field and the need for stronger more wide-ranging action. This should not only involve edictal levels (for which there exist the well-known difficulties faced by any approximation measure that has to take account of quantitative and qualitative parameters that are closely dependent on the overall structure of the sanctions chosen by each jurisdiction, in which very different factors come into play, such as, for example, the power conferred on competent authorities to decide on the actual sentence given, and, therefore, to re-define the sentence to be served, as in Italy with the executive judge) but also the provision of complementary sanction (such as exclusion from European public office or from economic benefits that weigh on European finances) and, more generally, all the factors involved in the determination of the response of institutions to crime (for example, aggravating and mitigating circumstances), including prescription, one of the areas in which the extreme heterogeneity of existing national solutions is the source of intolerable differences between one state and another (absolutely incompatible with the principle of equality, which is a key EU right).

Thus, a rather ambitious perspective emerges from the report, prefiguring the competence of the EU (as a necessary implication of the establishment of a European Public Prosecutor's Office) to formulate criminal provisions in this specific area, a competence which goes well beyond the current work of harmonization and organization of national penal provisions, entailing the specific formulation of criminal typologies, and their respective sanctions.

Moreover, the report also addresses the fundamental question, still debated today, of whether it would not also be indispensable, together with the provision of criminal typologies, to provide for definitions of supranational crime in general, a solution that would ease matters regarding general principles and problems of inconsistency which would arise from the simplest solution of merely referring back, on this point, to national rights, and in particular to the national law of the country where the trial is taking place. In fact, a methodological approach that limits legislative unity to the formulation of criminal typologies would ultimately prove to be not only questionable in terms of legality (and in clear contrast with the principle of equality of European citizens), but also totally ineffective in terms of protection, by reason of the direct effect of the general definition on the extent of the applicability of the specific definitions. In terms of unification this would amount to a "labelling fraud."<sup>14</sup> It is only through the formulation of general definitions that the evaluation of the effective scope of application of common typologies can be translated at the supranational legislative level (resulting from the combination of common specific definitions and general definition clauses), thereby ensuring greater compliance with the principle of equality.

<sup>14</sup> For a discussion of this point, see R. SICURELLA, *Some reflections on the need for a general theory of the competence of the European Union in criminal law*, in *Substantive Criminal Law of the European Union*, edited by A. Klipp, Antwerpen-Apeldoorn-Portland, 2011, especially p. 242 ff.; Id., *Setting up a European Criminal Policy for the Protection of EU Financial Interests: Guidelines for a Coherent Definition of the Material Scope of the European Public Prosecutor's Office*, in *Towards a Prosecutor for the European Union*, vol. 1, edited by K. Ligeti, Oxford and Portland, 2013, especially, p. 898 ff.

We cannot pass over the many criticisms levelled against this prospect, due not only to a 'natural' resistance to processes of regulatory approximation that call into question domestic rules based on established legal traditions (to a much greater extent than specific definitions) but also the tension it would trigger in connection with the principle of equality, prefiguring 'differentiated' and 'special' general definitions of the crimes within the jurisdiction of the European Prosecutor as regards those applicable to the generality of offences. In this regard, it should be underlined that this 'differential treatment', while not free from criticism, is no less problematic (and 'derogating') than it may seem at first (apart from the possible, and feared, harmonization 'cascade' effect, which would involve the progressive 'contamination' of EU rules in other areas of regulation). A diversity of hermeneutical approaches is not entirely unknown or exceptional - and hence a diversity of procedural outcomes - depending on the regulatory areas to which the general definitions refer (in fact, there are many differences to be found in the ascertainment of wilful misconduct), with the result that this would lie in the area of consolidated practice and that, if properly framed and given guarantees, should not be unacceptable a priori.

The indications briefly outlined so far may be regarded, in the light of the most recent debates on the subject, as still perfectly valid and acceptable, and so may help us reconstruct and formulate the criminal law enforceable by the European Public Prosecutor's Office, firstly to identify the unlawful acts covered by the Italian phrase used in the Italian version of Article 86 TFEU. This gives us the choice of a strictly literal and inevitably restrictive interpretation of the phrase, which focuses on the exact semantic meaning of the verb "ledere (harm)" - which refers, technically, to the concept of harming an asset, in this case Europe's finances - or rather opt for an extensive-functional interpretation of the word "ledere" that would embrace a much wider range of situations in which there may be no actual harm, and which would be described, in the criminal phenomenology of European fraud, as behaviour statistically constituting links in a criminal chain that involves cases of fraud. In this case, the expression "reati che ledono gli interessi finanziari dell'Unione" would mean the same as "crimes offending the financial interests of the Union" in the broad sense of offences which *concern* EU financial interests or otherwise have an impact on its financial interests, an interpretation that undoubtedly will seem a bit forced (and in some ways even incorrect) to the ears of a criminal lawyer (used to the specific character of the legislative formulas of common criminal typologies, but which the provisions of the Treaty do not contain), but which, in certain respects, seems to be more convincing.

The choice in favour of one or the other is clearly not neutral since the definition of the sphere of intervention of the European Public Prosecutor's Office, would have an impact on domestic legal systems and, what is most interesting here, the magnitude of a possible interventions to unify criminal law enforceable by that body.

In the first case, the competence of the European Public Prosecutor's Office would be subject to the structural aspect, the constitutive element, of the actual damage to European finances produced by the conduct in question. This hermeneutic option would define the spheres of competence of the newly-formed European Public Prosecutor's Office in terms that are much more restrictive than envisioned by the legislative definitions proposed in the *Corpus Juris 2000*, where

the actual harm to the EU's financial interests is considered a constitutive element of common criminal typologies only for bribery and abuse of office (it was only for embezzlement in the first version published in 1997), while for the remaining criminal acts, where provided for, harm is only potential (fraud against financial interest and disclosure of confidential information). In contrast, the exclusion of actual damage as a constitutive element of the crimes within the jurisdiction of the European Public Prosecutor's Office - which would involve a less rigid interpretation of the term "ledere" – would logically lead to a broader a more fluid determination of the spheres of competence of the office.

Indeed, a look at other language versions of the Treaty shows us that the terms used to describe the scope of competence of the European Public Prosecutor's Office are less stringent (than the term "ledere" in the Italian version) and do not entail actual damage being caused to European finances, thus legitimizing an interpretation of the text which, while remaining in the sphere of a strictly literal interpretation, prefigures areas of competence that are more extensive than those covered by the proposals of the *Corpus Juris*. This is clearly seen in the differences between the word used in the English version of Article 86 TFEU - "crimes affecting the financial interests of the Union" - and the verb "harming", which is found in the proposals of the *Corpus Juris*. Logically, the first has a broader meaning (and therefore the competence of the European Public Prosecutor's Office would go beyond what is provided for in the *Corpus Juris*). However, this brings us to another question: having abandoned the 'certainty' of the structural requirement of producing actual harm to European finances, what criteria do we use to delimit this competence and identify with certainty the "crimes that harm the financial interests of the Union"? The wording undoubtedly covers cases of so-called concrete danger, that is, cases which, while not necessarily producing damage, effectively expose European finances to danger. No doubt less undisputed (and, in all likelihood, provoking opposition) is the possibility that this wording can subsume criminal typologies which, while their primary objective is the protection of different types of assets, may be considered, in view of the criminal phenomenology that affects Europe's finances, crimes that in the broad sense are 'instrumental' as regards the protection of European financial interests, in that they are logically involved in the definition of a coherent strategy for the protection of these fundamental interests. This reconstruction would lead to the inclusion within the 'natural' competence of the European Public Prosecutor's Office not only of offences involving the single currency<sup>15</sup> – which in doctrine has often been consid-

15 On this point, see R. Sicurella, *Setting up a European Criminal Policy for the Protection of EU Financial Interests: Guidelines for a Coherent Definition of the Material Scope of the European Public Prosecutor's Office*, in *Toward a Prosecutor for the European Union. Vol 1: A Comparative Analysis*, edited by Ligeti, Oxford, 2012, 885-886. See also therein the article by F. Bianco, *Tutela dell'euro e competenza della Procura europea nel futuro scenario dell'Unione*, p. **check** That the protection of the euro should naturally be within the European Public Prosecutor's sphere of competence is supported by many taking part in the debate launched by the European Commission on the Green Paper on the criminal-law protection of the financial interests of the Community and the establishment of a European Public Prosecutor (COM (2001) 715 final); see Report on the Green Paper on the criminal-law protection of the Community's financial interests and the creation of a European Public Prosecutor, COM (2003) 128 final, paragraph 3.2.1.1. Similar proposals are to be found in the Conclusions of the *European Public Prosecutor Working Group* (Madrid, 29 June - 1 July 2009), available at [www.fiscal.es](http://www.fiscal.es) (see especially §§ 2.2.2. and 23.4), which give a broad interpretation to the notion "crimes affecting the financial interests" contained in Article 86 TFEU.

ered part of the notion (understood in the wide sense) of “financial interests”<sup>16</sup> - but also the crimes committed by European public officials against the EU (bribery, embezzlement, etc.). Such an interpretation, no doubt controversial, seems in many ways more consistent from a practical-functional point of view (ensuring a more effective European Public Prosecutor’s Office, no longer dependent on the need to prove that actual damage has been done or that European finances have been exposed to danger). It is also more consistent from a legal point of view, since the prevention of and fight against corruption - as well as embezzlement in general - have long been seen as indispensable components of the anti-fraud strategy of the EU’s regulatory instruments, irrespective of the existence of an actual or potential harm to the European finances. It is also true from a broad political point of view: the public might not understand why the European Public Prosecutor’s Office has no competence over the unlawful conduct of a category of persons that are often considered privileged, and who, in this way, would frequently go unpunished, because of the heterogeneity of criminal systems).

In the light of these arguments, supported by legislation that constitutes the *acquis* in the field of protection of financial interests, it does not seem unreasonable to claim that the scope of competence of the future European Public Prosecutor’s Office should also cover conduct that may only potentially and indirectly damage the EU’s financial interests or expose them to danger.

A reading of the prescriptions in Article 86 TFEU, in the context of the treaty’s overall regulatory framework for the creation of an area of freedom, security and justice, also leads to the conclusion that this ‘unification’ prospect cannot in any way lead to the priori exclusion of the unification of general definitions of crime, or more precisely, specific definitions for which unification is needed to make the European Public Prosecutor’s actions effective and equivalent, and, therefore, justified in the light of the principle of subsidiarity. So, the possibility should not be excluded, but rather hoped for, that the law enforceable by the European Public Prosecutor’s Office consists also of common provisions of general definitions. It must be pointed out, however, that initiatives in this direction would not (or rather should not) aim at establishing a common dogmatic definition of certain notions or crimes, which would generate more conflict and would not be directly relevant in terms of harmonization of repression, but indicate as clearly as possible the main requirements, situations or conduct which must be subsumed in such notions and, therefore, within the competence (as regards the protection of financial interests) of the European Public Prosecutor’s Office. These interventions to unify the general definitions may indeed also be conducted in very different forms, so that, along with the introduction of European precepts regarding general definitions, harmonization of the general typologies may actually be achieved through the formulation of incriminating typologies, and the ‘typification’ of conduct amounting to complicity in the broad sense, so that specific prodromal conduct (regarded as relevant in terms of offensiveness) is raised to the level of ‘crime’ (for which punishment is manda-

16 cf. A. BERNARDI, *Presentazione*, in *La tutela penale dell’euro. Teoria e prassi*, edited by A. BERNARDI, Padova, 2005, p. XV; E. MEZZETTI, *Quale giustizia per l’Europa? Il «Libro verde» sulla tutela penale degli interessi finanziari comunitari e sulla creazione di un pubblico ministero europeo*, in *Cass. Pen.*, 2002, 3963.

tory), or by including thresholds of criminal liability or causes of exclusion of liability, etc., in the description of the common typologies.

The physiological involvement – in cases where criminal protection is provided on a supranational level – of general definitions is also found in the provisions of crime directives adopted since the entry into force of the Lisbon Treaty, in which we may recognize not only compulsory sanctions that cover a more or less extensive range of criminal conduct, but also provisions that explicitly set compulsory sanctions for cases of attempt and complicity in the conduct described therein. This is something that is undoubtedly emblematic of what is considered the natural (and inevitable) relevance (and interference) that these typologies have on the determination of an area of crime, but which, according to the approach adopted so far in the Directives, is also clearly paradoxical in the cases where such directives do not provide any ‘common’ criteria for the assessment of the importance of these cases of attempt or complicity, effectively referring this aspect to individual national regulations and in this way making national laws partly responsible for assessing penalization at European level.

It is a solution which is obviously not logically feasible if we wish to establish a common criminal law enforceable by the European Public Prosecutor’s Office, a prospect which - we must reiterate - undoubtedly erodes the present discretion of national authorities on the subject (already scaled down over the years by ongoing regulatory approximation processes), but which does not involve a logic that ‘separates’ this common law (of European origin) from individual national systems, since the law in question will be interpreted by the national courts before which (in the absence of a European criminal law authority, which is not mentioned in the treaty) the European Public Prosecutor’s Office takes legal action. This situation logically prefigures a true ‘integration’ of this law in the mesh of domestic systems (as has happened, moreover, in other areas of regulation since the beginning of European integration).

#### **THE SMALL (AND TIMID) STEPS IN THE DETERMINATION OF EUROPEAN CRIMINAL LAW ENFORCEABLE BY THE EUROPEAN PUBLIC PROSECUTOR’S OFFICE. OTHER SOURCES APART FROM ARTICLE 86 TFEU AND THE PROPOSAL FOR A DIRECTIVE ON CRIMINAL LAW PROTECTION FOR THE EU’S FINANCIAL INTERESTS**

While there can be no doubt about the indispensability of making a further qualitative leap with the introduction of common rules of substantive criminal law to free the sphere of competence of the European Public Prosecutor’s Office from the quagmire of the present heterogeneity of provisions at the national level, neither can there be any doubt, in the light of the above considerations, of the prescriptive weakness in this regard of Article 86 TFEU, which risks legitimizing resistance of member states and ‘retreats’ to less binding paradigms of European legislation.

The inconsistencies mentioned before about the legislative formula of Article 86 TFEU make it impossible to identify, in this provision, the undisputed legal basis for initiatives aimed at unifying substantive criminal law (namely initiatives to introduce supranational precepts). This does not exclude the possibility - given the

recognized need for such an intervention and its legitimacy as regards the principle of European subsidiarity - that if there is a clear political will, the regulation establishing the European Public Prosecutor's Office could contain a core group of common supranational definitions, which would, in some ways be the 'natural place' for criminal law enforceable by the office (although, according to the literal meaning of the words and on the basis of a strict observance of the principle of conferred powers, the possibility of introducing truly supranational precepts, through the regulation therein, seems at present to be precluded)<sup>17</sup>.

However, if there is no such political will (as seems to be the situation at the moment), thus little chance of introducing real supranational criminal definitions in the constitutive regulation, the law enforceable by the European Public Prosecutor's Office cannot but be the national law (if and when) it is harmonized in implementation of the legislative instruments adopted in the field of protection of financial interests. The implementation of the European Public Prosecutor's Office would, thus, be founded on two pillars that are completely different in 'form' and 'nature': supranational - the institutional pillar, and national (albeit harmonized) - the regulatory pillar, a solution that is clearly problematic in terms of solidity and efficiency.

In this light, a major role will be played by the proposal for a directive on the fight against fraud to the Union's financial interests (PIF Directive), presented by the Commission (in its latest version) on July 11, 2012<sup>18</sup>. Negotiations on the document seem to have reached their final stages, on which, for more than a decade, hopes have rested for improvements and greater harmonization in the field of the protection of financial interests. These expectations cannot but be further raised by the special and essential function to be played by this document in a new institutional context (compared to when the proposal was first made in 2001<sup>19</sup>): the definition of the criminal law enforceable by the European Public Prosecutor's Office.

However, a rather disheartening picture emerges from the results of impact assessments conducted by the Commission in recent years on the harmonizing measures adopted in the PIF sector - which can definitely count on a significant

17 It must be pointed out that although the introduction of truly European precepts in the framework of the Regulation is desirable in the light of the above considerations about the need for effectiveness and legitimacy in the actions of the new office, it raises many concerns at the level of democratic legitimacy, because of the exceptional nature (compared to so-called ordinary legislative procedure) of the regulatory procedure mentioned in Article 86 TFEU. This provides for the adoption of the Regulation establishing the European Public Prosecutor's Office unanimously by the Council after it has been (merely) approved by the European Parliament. Although the well-established institutional dialectic between the Council and the European Parliament has led to virtuous praxis, according to which in no case is the full participation of the European Parliamentary substantially precluded in the definition of the content of the legal act (praxis which has led to the essentially 'faded' outcome of the distinctive and exceptional characteristics of the procedure at issue here compared to ordinary legislative procedure) (on this point, cf. L. DE MATTEIS, Report presented to the conference on *La protezione dei diritti fondamentali e procedurali dalle esperienze investigative dell'Olaf all'istituzione del Procuratore Europeo*, p.). The weakness of this solution foreshadows (at least theoretically) the paradoxical situation of a (possible) democratic deficit - which has been condemned for years and which is being addressed with great difficulty with the generalization in Lisbon of the co-decision procedure - precisely with regard to the first act constituting a truly European criminal standardization. In the sense of an overall democratic legitimacy of this special procedure, because (and as long as) it is used for the adoption of acts that establish forms of (albeit incisive) harmonization (and not unification), cf. A. NIETO MARTIN, *Principio di legalità e EPPO*, in *Le sfide dell'attuazione della Procura europea: necessità di norme penali comuni e loro impatto sugli ordinamenti interni*, a cura di G. Grasso - G. Illuminati - R. Sicurella - S. Allegranza, Milan, 2013 (in press).

18 COM (2012) 363, 11.07.2012.

19 COM (2001) 272, 05.23.2001, as amended by COM (2002) 577, 16-10-2002.

legislative *acquis*, consolidated over the decades, such as the Convention ‘package’ on the protection of the financial interests of the European Union in 1995<sup>20</sup>, the two additional protocols adopted in 1996<sup>21</sup>, and 1997<sup>22</sup>, on corruption and money laundering and on the liability of legal persons respectively. A situation that could be described as “barely sufficient”, as regards the formal adaptation of national laws to the requirements of the abovementioned legislative texts, becomes even weaker when we move from the formal level to the one of effective implementation and level of *real approximation of regulatory systems* in this area.

A quick look at the tables annexed to the Commission Communication of 26 May 2011 “on the protection of EU financial interests by criminal law and administrative investigations: an integrated policy to safeguard taxpayers’ money”<sup>23</sup> clearly illustrates the commission’s criticism of the absence of “a common playing field”, in the sense of a ‘harmonious’ regulatory environment, and the ‘cohabitation’ of very different choices as regards the degree of protection to be provided (whether arising from the differences of the conducts punished, or the diversity of models for the construction of common definitions, conceived sometimes in terms of criminal events or sometimes mere conduct, or the differences due to offences being regarded as ‘unfinished’ or involving complicity).

This picture clearly shows us the challenges that lie ahead in the delicate negotiations on the proposal for a PIF directive, as well as the expectations for significant and real qualitative progress in the approximation of national laws in this area: how can the European Public Prosecutor’s Office function properly, in what way could it be legitimized in essence, if the applicable substantive law were to be determined through harmonization instruments that connote substantial continuity with existing tools which for years have been criticised for their inadequacy? Indeed, it is seen representing the natural completion, in terms of substantive criminal law, of the establishment of the European Public Prosecutor’s Office. This is clear from the context of the current discussion on the proposal for a PIF directive. This was first conceived in 2001 as an ‘autonomous’ text (its independence reiterated at the technical-legal level)<sup>24</sup>. Progressively, though, it has gradually been ‘drawn’ (at least ideally) into the group of regulatory instruments which, in recent months, have been negotiated by the Commission in view of the adoption of a legislative package aimed essentially at improving the institutional dimension of the fight against fraud (the most significant pieces of legislation are seen as the proposal for a regulation establishing the European Public Prosecutor’s Office and the proposal for a regulation strengthening Eurojust). However, its contents cannot be determined except by satisfying the need for enough approximation to ensure the effectiveness of the office. From this point of view, we must highlight what could be called a *function of purpose* played by Article 86 TFEU in future EU initiatives in the field of the protection of financial interests, even if for the moment no agreement is reached on the

20 GUC 316 of 27.11.1995, 49 ff.

21 GUC 313 of 23.10.1996, 2 ff.

22 GUC 221 of 19.7.1997, 12 ff.

23 COM(2011)293 final.

24 Thus L. KUHL, *The Initiative for a Directive on the Protection of the EU Financial Interests by Substantive Criminal Law*, in *EuCrIm*, 2012, issue 2, pp. 63 e 65.



establishment of the European Public Prosecutor's Office, due to the fact that because of the undoubtedly binding nature of the goal of implementing and strengthening an area of Freedom, Security and Justice (of which the creation of a European Public Prosecutor's Office is indicative), coherent and effective work is also required on the choice of sanctions that European lawmakers will have to make in the short term. Over and above the creation of this new European office - and despite the limitations and the inherent weakness of such a provision - the (albeit limited) regulatory guidelines in the Treaty cannot but coherently represent important guidelines for future choices of EU criminal policy, even prior to the full implementation of this provision and the actual establishment of a European Public Prosecutor's Office (in particular, but not exclusively, with regard to regulatory measures concerning the protection of financial interests).

In view of this, from the evaluation of the content of the draft directive there emerge pros and cons. The text of the PIF directive currently under discussion 'lies quite low' as regards the determination of criminal typologies, being described as a mere 'Lisbonisation' of the existing definitions in the *acquis* on the issue, as is clear from a reading of Articles 3 and 4 of the proposal, which reproduces the definition of "fraud" from the PIF Convention and that of corruption (though with some interesting variants)<sup>25</sup> and laundering from the two Additional Protocols of 1996 and 1997. In addition to these notions, borrowed from the *acquis* in this matter, article 4 of the draft directive, entitled "fraud related offences", includes two 'new' offences (probably inspired by the proposals of the *Corpus Juris* and the indications that emerged from the debate on the *Green Paper*), concerning respectively fraudulent behaviour in procedures for public procurements, and embezzlement and appropriation by officials responsible for the management of European funds.

Criticism from various quarters has been levelled at the lack of courage in this proposal, which mandates sanctions for conduct (such as the disclosure and use of confidential documents) that has been proved detrimental to the EU's financial interests and so for this reason was originally included in early versions of the text, in the wake, also, of what was proposed in the *Corpus Juris*<sup>26</sup>, and also put forward in

25 With regard to the definition of bribery, we should underline the elimination in the agreement of the requirement that the corrupt agreement be contrary to official duties, which should logically be inferred from the desire to extend criminal offences also to cases in which bribery regards a legitimate act (in accordance with official duties). This option, however, does not address the many criticisms expressed about the adequacy of such a definition, in particular where it continues to identify the core of the offence in the corrupt agreement concerning the performance or omission of an "act" (a specific act) and not instead the "performance of function", in the wake of the most recent regulatory interventions in the field at both international and national level, which have thus tried to address the many problems posed by the need to identify the specific act that is the object of the corrupt agreement.

26 A comparison with the offences constituting the "specific part" of the *Corpus Juris* also shows the apparent absence of a provision relating to criminal conspiracy for the purpose of committing offences affecting financial interests. The reference to a criminal organization for the purposes of committing offences under the Directive is to be found exclusively in Article 8, which (as we will explain below in the text) sets prison sentence thresholds, establishing a minimum threshold of the maximum statutory penalty (10 years), as compared with the one for the generality of offences (5 years). Although some may criticise this solution as indicative of the aforementioned (excessive and 'dysfunctional') limitation of the competences of the European Public Prosecutor, excluding organised crime affecting financial interests, whose seriousness and impact on the protection of the same has for some time been at the basis of numerous EU regulatory interventions, it is to be shared from the perspective of defining the scope of the competence of the European Public Prosecutor's Office, which should not go beyond the scope of the offences affecting supranational interests and which are within the sphere of the Union. It is a situation which, in the present state of European integration, is not designed for the benefit of law and order, which traditionally underlies the indictment for criminal association. In this context, Arti-

the Green Paper on criminal law protection of financial interests<sup>27</sup>. However, from the analysis of the structure of the two ‘new’ typologies (or rather the typical characteristics indicative of the negative values of these acts of fraud in procurement and wrongful retention, for which mandatory sanctions are provided) there emerge, in fact, some points of great importance, such as acts carried out irrespective of the actual or potential harm to financial interests, required in the well-known definitions contained in existing PIF instruments (in the definition of fraud against financial interests, the threshold of criminal liability is particularly selective, in that actual damage needs to have been caused, whereas potential harm is sufficient in the case of bribery). Consequently, we can conclude that the draft directive, even in the face of the current ‘narrow’ content, provides a conceptually broad notion of “crimes affecting the financial interests of the Union” used in Article 86 TFEU, endorsing the rejection of a strictly literal (and restrictive) interpretation thereof. This opens up prospects of considerable interest as to the *expansive potentialities* of the *natural competence* of the European Public Prosecutor’s Office, covering behaviour that does not directly and immediately affect financial interests – even if abstractly exposing these interests to danger or otherwise harmful consequences. In this regard, it is indeed difficult to understand, at least from the medium to long term perspective, why they have been excluded from the material competence of the future European Public Prosecutor’s Office (the reference here, as already remarked, is not only to the various types of crime against the public administration, of which the draft directive takes into account only those involving embezzlement or diversion, but also conduct detrimental to the single currency).

The proposed directive is also absolutely in line with existing instruments. It reproduces the recurrent formulas in all the directives adopted so far in criminal matters, merely laying down mandatory sanctions for cases of attempt or complicity, without adding anything to the possible criteria for determining the seriousness of this conduct (and in fact refers the matter to the (different) existing regulations in force in domestic legal systems). This solution contains an obvious incongruity. While it is true that the provision for the mandatory criminalisation of these cases is a clear indicator of an evaluation made a priori by European lawmakers about the need to prosecute behaviour which not only directly complements a crime but also constitutes a necessary antecedent (thus showing a need for approximation of legislation on criminal liability for such conduct), the absence of independent criteria for the criminal liability of such conduct means that the exact scope of crimes that meet the criteria and deserve punishment (from the supranational perspective) depends on the choices made within each jurisdiction on the criteria for assessing

cl. 8 par. 2 of the draft PIF directive, which establishes the obligation for Member States to set a higher ‘minimum maximum’ for the penalty prescribed by law in the case of the offences referred to in Articles 3, 4 and 5 of the Directive, carried out by a criminal organization (in the meaning of Framework Decision 2008/841/JHA), can be read as a form of enhanced protection of the financial interests. This provides that these offences fall within the context of criminal organization (being part of a criminal plan is not enough), which as such (due to the particular organization of the means and people involved in it) can generally cause more serious harm to protected interests. In general, on the question of the non-existence of a supranational legal benefit for the purpose of European public order, see R. SICURELLA, *Diritto penale e competenze dell’Unione europea. Linee guida di un sistema integrato di tutela dei beni giuridici sovranazionali e dei beni giuridici di interesse comune*, Milan, 2005, pp. 336-342.

27 *Libro verde sulla tutela penale degli interessi finanziari comunitari e sulla creazione di una Procura europea*, cit.

conduct prodromal to the commitment of an offence. It is an incongruity that would, logically, appear to undermine the success of the project. Moreover, it is difficult to reconcile with the common objective of implementing an area of Freedom, Security and Justice and the prospect of ‘unification’ implied by it.

However, certain provisions in the proposal show greater ambition and courage, and among them special mention must be made of the provision of Article 6 which, by acknowledging some consolidated acquisitions of European case law, provides an articulated set of requirements for the construction of the criminal liability of legal persons (broadly ascribable to the Italian model), requirements which may be considered as constituting the first European model of the criminal liability of entities. Article 8 also deserves special mention. It establishes a *minimum threshold for the minimum punishment* for some of the criminal cases considered by the proposal (in addition to minimum thresholds for the maximum punishment), thereby aiming to have a greater (and also more problematic) influence on the lawmakers’ discretion in the provision of sanctions (and indeed also the overall sanction structure of individual legal systems, which explains the stiff opposition shown by member states)<sup>28</sup>. However, the complexity and variety of sanctions - which, far from being limited by the parameters prescribed by law, depend greatly on circumstances, the provision of accessory sanctions, and even powers granted in various legal systems to authorities responsible for the executive phase of the sentence, is bound to tone down harmonisation significantly, which, in the absence of much broader action<sup>29</sup>, will not be able to guarantee the (sought after) equivalence in protection<sup>30</sup>. Moreover, the proposal for a single threshold for all the cases considered creates tension as regards the principle of proportionality of punishment, a principle that has long been recognized as a fundamental right of the EU and now formalized in Article 49 paragraph 3 of the Charter of Nice.

But the most innovative proposal is undoubtedly the one contained in Article 12 which establishes the obligation for Member States to establish, for the criminal acts identified in the directive, “a prescription period of five years from the time when the offence was committed”. In addition, the article states that “the prescription period shall be interrupted and commence anew upon any act of a competent national authority ... until at least ten years from the time when the offence was committed”. This proposal is a first step towards harmonizing prescription periods for the crimes provided for in the Directive, thus accepting many requests expressed in the past about the urgent need to harmonise the considerable

28 A similar (problematic) provision was introduced in the proposal for a directive of the European Parliament and of the Council on the criminal law protection of the euro and other currencies against counterfeiting, and which replaces Council Framework Decision 2000/383/JHA, COM ( 2013 ) 42 final, Strasbourg, 5.2.2013.

29 In this regard, we should underline the interest for the ‘global’ approach which, as regards the delicate issue of the harmonization of penalties, was adopted by the *Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union* COM (2004) 334 final, of 30.4.2004.

30 We should mention in this regard that the provision of Article 12 § 3 of the draft directive, which, obliges Member States to enforce, upon conviction by final judgment for one of the acts referred to in the text, a period of execution of the sentence that is “sufficiently long” and in any event not less than 10 months, represents the first attempt at approximation for the execution of sentences, evidently in an attempt to reduce the significant differences that exist on the actual afflictive impact of punishments for offenders.

heterogeneity existing in this regard in different national legal systems.

Over and above the content of the proposal we have looked at so far, special attention and reflection should be given to the preliminary and fundamental issue of the legal basis chosen by the Commission - Article 325 TFEU - and strenuously contested by Member States, which would prefer Article 83 TFEU, by virtue of the (alleged) special nature (and therefore priority) of this provision, given its exclusive role, assigned to it in the treaty, of setting the forms and conditions for the interventions of European lawmakers in criminal matters. Member States' interest in changing the legal basis is evident: with regard to the specific field of the fight against fraud affecting European finances, Article 325 TFEU enshrines the competence of the Union to take the "necessary measures in the fields of the prevention of and fight against fraud [...] with a view to affording effective and equivalent protection in the Member States [...]", and prefigures a competence of the Union that is potentially much more incisive than can be expected from the general provision in Article 83 TFEU. In fact, European lawmakers would not be limited, as they would with article 83 TFEU, to the establishment of "minimum rules" (regarding the definition of criminal offences and sanctions), thus comprising all "necessary measures" to prevent and fight against fraud affecting the financial interests of the Union" with a view to affording effective and equivalent protection" (measures which could, therefore, give rise to very precise provisions), and they would be completely exempt from the possible use of the "emergency brake" procedure, not referred to in any way by the provision<sup>31</sup>.

Besides, the use Article 325 TFEU as a basis for more incisive competence than that provided by Article 83 TFEU does not in any way mean surreptitiously forcing the boundaries of the competences defined by the Treaty (and accepted by Member States) in which the Union's competence to introduce criminal measures is strictly (and exclusively) framed in the specific political and institutional context set by Article 83 TFEU, the only provision specifically referring to the Union having this power (the clearest manifestation of which is the provision for an "emergency brake" procedure). Article 325 TFEU, in fact, not only provides for a (generic) legislative competence of the Union in the field of protection of financial interests (which, notwithstanding the provisions of the general provision in Article 83 TFEU, would provide further and more incisive powers of the Union to intervene in criminal matters), but it represents, in the context of the provisions relat-

31 See R. SICURELLA, *Questioni di metodo nella costruzione di una teoria delle competenze dell'Unione europea in materia penale*, in *Studi in onore di Mario Romano*, Napoli, 2011, especially p.2602. According to some commentators (see L. PICOTTI, *Il Corpus Juris 2000. Profili di diritto penale sostanziale e prospettive d'attuazione alla luce del progetto di Costituzione per l'Europa*, in *Il Corpus Juris 2000. Nuova formulazione e prospettive di attuazione*, edited by L. Picotti, Padova, 2004, especially p. 84 ff., where the author comes to this conclusion for a similar provision contained in the Draft Constitutional Treaty), the absence of any reference to the exclusivity of the legal instrument of the directive, would prefigure the (abstract) possibility of the legitimate adoption of a regulation containing measures of a criminal nature, therefore, effectively making them directly applicable to supranational cases. On the other hand, this possibility would logically seem to require that the Union is actually attributed this direct criminal competence, involving a change from an 'incomplete' criminal competence (since a directive requires it to be transposed in national law to ensure that the precept is channelled into the legal system by an act of domestic law) to a full criminal competence (with the adoption of rules which, because they are contained in a regulation, enter the system directly without any filtering by domestic legislation and must be directly applied by judges to individuals), G. GRASSO, *Il Trattato di Lisbona e le nuove competenze penali dell'Unione europea*, in *Studi in onore di Mario Romano*, cit., p. 2347.

ing to the budget, the specific legal basis for EU action in the field of “prevention of and fight against fraud affecting the financial interests of the Union”. This would lead us to consider the legislative text of Article 325 TFEU as forming an independent juridical basis, and the competence of the Union enshrined therein freed from the criteria of legitimization under Article 83 TFEU (that such action is “indispensable” to guarantee the effective implementation of EU policy), and ‘exclusively’ subject, like any regulatory initiative of the Union, to full compliance with the principle of subsidiarity, on the one hand, and, being criminal law harmonization measures, to an assessment of the existence of the conditions of legitimacy arising from the principle of criminal *extrema ratio*. It is, therefore, not Article 83 TFEU that should be considered a special regulation, and thus taking precedence over Article 325 TFEU, but, on the contrary, it is the latter, which forms the appropriate legal basis for any measure concerning the harmonization of criminal law in the protection of European financial interests (and in the case of the proposed PIF directive currently under discussion).

The current discussion about the change of legal basis risks not only weakening the current legislative construction for the protection of financial interests, not acknowledging the legal basis of Article 325 TFEU (which is nothing if not a ‘descendant’ of Article 280 TEC, undisputed legal basis to this day), but also mortgaging the evolution of EU action in this area, presenting this as ‘policy within policies’ and therefore denying European public finances the rank which is given to them at national level (where the capacity to implement policies depends on financial assets), and justifying repressive responses that are very strict in many jurisdictions, since public finances (because of their function) are assets if the highest rank.

## CONCLUDING REMARKS

The strategy of small steps is undoubtedly what has made the European integration process a success. In the past, insufficiently thought-out attempts to speed things up sometimes led to vetos by Member States, consequently slowing down (or bringing to an abrupt halt) the process of European integration, and badly undermining the credibility of the European project. This general consideration cannot but be further corroborated by the handling of the particularly (technical as well as political) sensitive and delicate issue of crime.

Strenuous objections have always accompanied the debate on EU competences in this sphere, which have not been quietened by the adoption of the Lisbon Treaty. Any EU action in criminal matters is bound to come up against strong opposition and obstructionism from Member States. They will always try to seize on the slightest weakness in European initiatives, especially as regards their compliance with the general principles of criminal law, the principle of equality and, more generally, the overall consistency and ‘acceptability’ of EU choices on criminal policy.

With specific regard to the interesting question of the establishment of a European Public Prosecutor’s Office, a ‘reductive’ solution based on political consensus does not, however, necessarily mean it will be adopted with great enthusiasm by citizens (or academics and legal practitioners), if it should involve the ‘subjugation’ of choices essential for the construction of Europe to the pretensions of

politics to keep the areas of discretion as extended as possible, even at the price of substantial failure.

European institutions - and in particular, of course, the European institutions par excellence, the Commission and the European Parliament – which have indeed shown full awareness of the ‘special case’ of the competence conferred upon the Union in criminal matters, cannot fail to keep in utmost account that ambitious and politically difficult choices in this area, provided they can ensure coherence and efficiency, and are properly considered and implemented, are no doubt preferable to initiatives that threaten to undermine the credibility of the European project.

In fact, this risk should also be clear to those responsible for making decisions at the national level. The major changes introduced by the Lisbon Treaty with regard to the Union’s competence in criminal matters cannot be read (at least exclusively) as a way of ‘subtracting’ further sovereignty from Member States. Many have not failed to note that, in the face of the inescapable ultra-territoriality of numerous phenomena (as a result of the overall magmatic process of globalization), the inability of individual Member States to address these phenomena on their own (by implementing ‘national measures’) leads inevitably to a ‘disavowal’ of sovereignty in its fullest and most meaningful sense (which presupposes total ‘controllability’ of the phenomena affecting one’s own land and people). This sovereignty may be regained by Member States (in a different form) by authoritatively and responsibly contributing to the effectiveness of Union action at supranational level. The loss of EU authority and credibility – underlined by an inadequate response to criminal matters – with its role as a global actor constantly undermined (due also to the preconceived obstructive actions of member states) - cannot fail to infect the States themselves, which (in this ill-fated case) will only be left with the paltry (and bitter) satisfaction of having reasserted their authority to rule over a pile of rubble.

# Centrality of the Person and the Area of Freedom, Security and Justice: the Role of the European Public Prosecutor's Office\*

*Check against delivery*

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*Starting with the observation that the fight against crime must be based on a high level of guarantees for the person, the author believes that the European Public Prosecutor's Office can be placed fully within the people-centric dimension that is taking shape in the European Area of Freedom, Security and Justice. The author carries out a thorough analysis of the principle of mutual recognition in judicial cooperation in criminal matters, highlighting its dual function: that of cooperation among national authorities and the harmonization of guarantees for those involved in interstate proceedings. This second aspect which, according to the author, should become the central issue, as a result also of the provisions in the Stockholm Programme.*

## **A EUROPEAN AREA OF FREEDOM, SECURITY AND JUSTICE, JUDICIAL COOPERATION IN CRIMINAL MATTERS, THE PRINCIPLE OF MUTUAL RECOGNITION: THE FEDERAL DIMENSION OF THE PRINCIPLE**

In the context of a conference intended to examine the legal implications of the establishment of a European Public Prosecutor's Office, in particular as regards operational issues and the activities it will be carrying out, my contribution (as a specialist in international law) will take a different perspective from those who spoke before me. I shall look at the 'form' or framework within which this office will be working, so as draw your attention to the more general issue of the Area of Freedom, Security and Justice as an EU objective and, at the same time, sphere of competence<sup>1</sup>. Sometimes the container – namely the significance given to the context in which cooperation takes place – can direct the development of the contents, much like form becoming substance<sup>2</sup>.

\* This contribution was written for the Studies in honour of Professor Giuseppe Tesauro.

<sup>1</sup> A great amount of doctrine has been written on this EU objective (and the many competences it would involve). We shall mention here a few of the most recent monographs on the above doctrine, especially those focusing on criminal law. See E. GUILD, F. GEYER (eds.), *Security versus Justice? Police and Judicial Cooperation in the European Union*, Ashgate, 2013; D. RINOLDI, *Lo spazio di libertà sicurezza e giustizia. I. Principi generali e aspetti penalistici*, Naples, 2012; C. ECKEN, TH. CONSTANDINIDES, *Crime within the Area of Freedom, Security and Justice: A European Public Order*, Cambridge, 2011; A.H. GIBBS, *Constitutional life and Europe's area of freedom, security and justice*, Aldershot-Burlington, 2011; G. GRASSO, R. SICURELLA (ed.), *Per un rilancio del progetto europeo. Esigenze di tutela degli interessi comunitari e nuove strategie di integrazione penale*, Milan, 2008; U. DRAETTA, N. PARISI, D. RINOLDI (ed.), *Lo spazio di libertà sicurezza e giustizia dell'Unione europea. Principi fondamentali e tutela dei diritti*, Naples, 2007.

<sup>2</sup> ARISTOTELES, *Metaphysics*, Book VII, 1041b.

Therefore, I shall be touching on all the interesting things mentioned in the speeches that have given substance to these days of study and the discussions in the last afternoon session, which should allow us to give the Italian government authorities some suggestions about the approaches to be adopted in the delicate role of Presidency of the Union, as of 1 July 2014, in support of a proposal for a European Public Prosecutor's Office that is sufficiently "independent, accountable and efficient"<sup>3</sup>, as it seems to be emerging from the draft regulation recently presented by the Commission to the Council<sup>4</sup>.

I would like to start my reflections by observing that, as concerns the EU's competence in criminal matters (whether exercised in terms of substantive, procedural or jurisdictional law), it has long been claimed that the legislative policies followed – from the Treaty of Maastricht (1993) to the entry into force of the Treaty of Lisbon (2009) – were biased in favour of security and repression of crime to the detriment of guarantees<sup>5</sup>. This has been asserted in relation to both criminal judicial cooperation, because of widespread use made of the principle of mutual recognition of criminal law judgments<sup>6</sup>, and the adoption of substantive criminal law or rules aimed at establishing authorities involved in various capacities in the administration of criminal justice, attributing this situation to a deficit of democracy which could seriously undermine the principle of strict legality in criminal law<sup>7</sup>. Since the occasion which brings us to discuss the issue is the establishment of a European Public Prosecutor's Office, the reflections I will be putting forward will only concern the jurisdictional sphere and criminal procedural law.

In a way that I hope does not appear too provocative or contradictory, I will try to upturn the above perspective and focus on an aspect that belongs to a very distant era of the process of European juridical integration, a period that spans the late nineteen sixties and early nineteen seventies, when a start was made on the so called "fifth freedom of movement" – regarding judgments in civil and commercial matters – which added to and increased the effectiveness of the four economic freedoms of movement in the area then called the common market. An important event in this regard was the Brussels Convention of 27 September 1968, which has been appropriately called a "Traité fédérateur"<sup>8</sup>. It introduced, for the

3 These are the objectives underlying the Commission's proposal for the establishment of the European Public Prosecutor's Office in its Communication *Better protection of the Union's financial interests: Setting up the European Public Prosecutor's Office and reforming Eurojust*, COM(2013) 532 final of 17 July 2013, p. 5, paragraph 3.

4 The proposed regulation was adopted on the basis of Article 86, para. 1 TFEU, presented on July 17, 2013 (COM (2013) 534 final), accompanied by a proposal for a regulation on the modification of Eurojust (COM (2013) 535 final) and a communication on the modification of the role of OLAF (COM (2013) 533 final), all adopted on the same date; the last proposal was formalized in Regulation (EU) 883/2013 of 11 September 2013, OJEU L 248 of 18 September, 2013, p. 1 ff.

5 Thus, for example, the contributions of T. Rafaraci, F. Longo, H. Labayle, e. Randazzo, in T. Rafaraci (ed.), *L'area di libertà sicurezza e giustizia: alla ricerca di un equilibrio fra priorità repressive ed esigenze di garanzia*, Milan, 2007, pp. 25, 77, 45-51, 68, 164, respectively.

6 See below, para. 2.2.

7 For a general discussion of the topic, see A. Bernardi, *Il principio di legalità dei reati e delle pene nella Carta europea dei diritti: problemi e prospettive*, in *Riv. it. dir. pub. com.*, 2002, p. 673 ff.; e ai miei *I diritti fondamentali nell'Unione europea fra mutuo riconoscimento in material legale e principio di legalità*, in U. Draetta, N. Parisi, D. Rinaldi (ed.), *Lo spazio cit.*, p. 113 ff.; *Ancora in tema di riconoscimento reciproco e principio di stretta legalità penale nell'Unione europea: alcune considerazioni a partire dall'entrata in vigore del Trattato di Lisbona*, in *Studi in onore di Mario Romano*, Naples, 2011, p. 254 ff. For a criticism concerning democratic deficit in the adoption of rules of procedural criminal law, see below, note 41.

8 Thus B. Goldman, *Un traité fédérateur: la convention entre les Etats membres de la C.E.E. sur la reconnaissance et l'exécution des décisions en matière civile et commerciale*, in *Rev. trim. dr. eur.*, 1971, p. 1 ff. As is known, the Convention was supplemented by Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12 of 16 January 2001, p. 1 ff., later "recast" in Regula-



first time within this process of integration, the principle of mutual recognition of the public law of others (albeit within the context of relationships between private persons), a principle thought to be so crucial to the process itself that it was then transferred to the common market. The latter, as a result of accepting this principle, even changed its name to internal market, acknowledging the principle of “country of origin” instead of “country of destination”<sup>9</sup>.

The principle of mutual recognition is a federalizing element: it assigns a concrete significance to the existence of a single juridical area for the movement of goods, assets, and people. It translates into a technique for the coordination of legal systems that can introduce a presumption of equivalence between the (material) assets and (juridical) values of different government bodies, so they can circulate within a legal area no longer conditioned by the existence of national borders within it and become common to all countries in their mutual relations. Thus, “the situation is no longer one where sovereign States cooperate in individual cases; instead, it is one where Member States of the European Union are required to assist one another when offences which it is in the common interest to prosecute have been perpetrated”; members that have, for example, “a system of surrender between judicial authorities, which results from a high level of [mutual] confidence”<sup>10</sup>.

That it is a case of seeing the European Union as a single judicial area is a perspective that emerges from many of its legislative acts. Consider, by way of example, Framework Decision 2009/948/JHA on prevention and settlement of conflicts of jurisdiction in criminal proceedings<sup>11</sup>, which states that the principle of mandatory prosecution should be understood and applied in a way that it is deemed to be fulfilled when any Member State ensures the criminal prosecution of a particular criminal offence<sup>12</sup>. The proposal for an EPPO regulation, too, adopts

tion (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 concerning jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in OJEU L 351 of 20 December 2012, p. 1 ff. Concerning full liberalization of the movement of judgments in civil and commercial matters implemented by the mentioned regulation, see the latest (in chronological order) significant ruling of the ECJ, judgment of 15 November 20120, Case C-456/11, *Gothaer Allgemeine Versicherung AG, et al.*, an interpretation that is literal (paragraph 23), teleological (paragraph 27) and therefore also independent of national laws (paragraphs 25-26), systematic (paragraphs 28-29), extensive (since it interprets the rules in the light of the exceptions, which must be interpreted in a restrictive way: paragraphs 30-32). On the different interpretative techniques to be used in the case, see also the Opinion of Advocate General Y. Bot, in the same case, adopted on September 6, 2012, paragraphs 41-53.

<sup>9</sup> In fact, the Brussels Convention was stipulated before the judgement of the Court of Justice of the European Communities of 20 February, 1979, in Case 120/78 *Rewe Central* (so-called *Cassis de Dijon*); and the Commission's White Paper on the internal market, COM ( 1985) 310, June 1985. On the principle in question applied to the construction of the internal market, and the resolution of conflicts of law and jurisdiction in private law, see. G. Rossolillo, *Mutuo riconoscimento e tecniche conflittuali*, Padua, 2002; S. Niccolin, *Il mutuo riconoscimento tra mercato interno e sussidiarietà*, Padua, 2005; P. De Cesari, *Diritto internazionale privato e processuale comunitario*, Turin, 2011 (which also mentions the extension of the Union's international and private law competence beyond the boundaries of the internal market).

<sup>10</sup> See the Opinion of Advocate General Ruiz-Jarabo Colomer, delivered on 12 September 2006 in Case C-303/05 *Advocaaten voor de Wereld VZW*, paragraph 46.

<sup>11</sup> Council Framework Decision 2009/948/GAI of 30 November, 2009, in OJEU L 328 of 15 December 2009, p. 42 ff.

<sup>12</sup> This is clear from Article 1 of the Framework Decision (“The objective of this Decision is to promote closer cooperation between national authorities (...) for the purpose of a more efficient and proper administration of justice”) and its twelfth recital (“In the common area of freedom, security and justice, the principle of mandatory prosecution, procedural law in the different Member States, should be understood and applied in a manner deemed to be fulfilled when each Member State shall ensure the prosecution in relation to a particular offense”). Expands the indication offered by the Framework Decision, also mentioned by the Court of Cassation (it., VI, Sec. Pen.) in the judgment of 20 December 2010, no. 45524, where it notes that one of the aims of the European regulation is to “avoid unnecessary parallel criminal proceedings, as in the common area of freedom, security and justice, the principle of mandatory prosecution, common to the procedural law of several Member States, must be understood and applied in a manner deemed to be fulfilled “when each Member State shall ensure prosecution in relation to a particular crime.”

the same approach. This is evident where, for example, it regulates mandatory prosecution<sup>13</sup> or where it establishes the admissibility of evidence, stating that, “evidence presented by the European Public Prosecutor’s Office to the trial court, 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, shall be admitted in the trial without any validation or similar legal process even if the national law of the Member State where the court is located provides for different rules on the collection or presentation of such evidence”<sup>14</sup>.

This introduces within the Union a model that is typical of federal systems, manifested in Article IV.1 of the U.S. Constitution<sup>15</sup> regarding the organization of relations between federated states within the federation. The provision states that “full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state”. In this dynamic then, the application of foreign law can determine legal solutions which could be different from those resulting from the application of national law<sup>16</sup>.

In the legal system of the European Union, this principle has a constitutional scope, described by the heads of state and governments of member countries as a “cornerstone” in the judicial cooperation between the courts of their countries<sup>17</sup>. Now it is part of the primary law of the EU<sup>18</sup>. It is one of the routes available to Member States and EU institutions to establish a European policy aimed at ensuring “a high level of security” in the Union<sup>19</sup>. The Treaty states that it will be used together with coordination and cooperation between criminal law authorities, as well as in the approximation of national criminal law<sup>20</sup>.

13 Article 27 and Recital no. 31.

14 Article 30; see also Recital no. 32. On a more general level, for the principle of mutual recognition in criminal matters as a way of giving rise to a single legal area, see G. De Amicis, *All’incrocio tra diritti fondamentali, mandato d’arresto europeo e decisioni contumaciali: la Corte di Giustizia e il “caso Melloni”*, in [www.europeanrights.eu](http://www.europeanrights.eu), pp. 11-12.

15 The parallel is drawn by D. Rinoldi, *Lo “spazio di libertà, sicurezza e giustizia”*, in U. Draetta and N. PARISI (Eds.), *Elementi di diritto dell’Unione europea*, Milan, 20103, p. 18; and Id., *Lo spazio cit.*, Chap. III, para. 5.

16 See the judgment of the EU Court of Justice of 11 February 2003 in Joined Cases C-187/01 and C-385/01, *Hüseyin Gözütok and Klaus Brugge*, paragraph 33.

17 The principle of mutual recognition became the cornerstone of judicial cooperation in both civil and criminal law as of the Tampere European Council (15-16 October 1999; see Conclusions of the Presidency, available online, 33 ff.) - thus even before it was constitutionalized in the Lisbon Treaty (see note below). It played a central role in the work carried out (in Group X) for the Treaty establishing a Constitution for Europe on the area of freedom, security and justice, in particular doc. Conv. 449/02 of 13 December 2002, Doc. Conv. 614/03 of 14 March 2002, Doc. Conv. 426/02 of 2 December 2002. The Commission Communication of 12 October 2005 *A strategy on the external dimension of the Area of Freedom, Security and Justice*, COM (2005) 491 final. The Hague (2004) and Stockholm (2009) programmes confirmed its centrality. It is discussed in the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 20 April 2010 *Plan of action for the implementation of the Stockholm Programme*, COM (2010) 171 final, paragraph 4, establishing the implementation phases (pp. 21-24 of the Annex). Article 70 TFEU gives the Council the task of adopting measures defining the methods of objective and impartial evaluation for the implementation by Member States of common policies “in order to facilitate full application of the principle” to the whole area of judicial cooperation among counterparts in different states.

18 Articles 67, para. 3, 81, para. 1, and 82, para. 1, clause 1 TFEU (TEU, pursuant to Article 1, clause 3, has the same legal scope of the latter).

19 Thus, pursuant to Article 67 para. 3, TFEU.

20 Agreeing with others (see below, note 33), I note that the rule does not account for the setup in a linear fashion. Instead, it emerges from the overall regulatory context under which the path towards the creation of a European area for criminal justice involves cooperation among national judicial authorities (primarily through mutual recognition), in the approximation of national laws and the integrated cooperation, which is not stated in the provision in question (but covered in other TFEU provisions).

The principle of mutual recognition is, therefore, one of the pieces of a political, cultural, legal context – the “idea of Europe” – which has triggered an epoch-making process that is continually surprising us with its discontinuities and originality of legal forms. It is a process that does not depend on automatism but is linked to the political plans and willingness of Member States to proceed along the path of integration by identifying, at each stage, the most appropriate legal instruments. This does not, of course, protect the process from backsliding or discontinuity.

This principle has to guarantee a series of different situations that may even appear mutually contradictory. In the background is the non-negligible issue of respect for the national identities of Member States. An optimal response seems to come from the choice (implemented by the Treaty of Amsterdam) of the framework decision and (today, with the Treaty of Lisbon) the directive. By pursuing the harmonization, and not the uniformity, of national laws, this type of legal instrument, although likely to introduce a tendency towards legislative divergence within the legal systems of Member States, allows them to integrate while respecting the individuality of each, chiefly reflected in their respective criminal justice system. There is also the question of compliance with the principles of the Union. Once again the framework decision and directive are functional to the pursuit of this goal. They are designed to identify a guiding uniform regulation, which cannot be disregarded by Member States when being adapted through detailed rules<sup>21</sup>. The person is at the centre of the tension that is thus determined between the requirements of respect for the identity of individual Member States and need to guarantee, in any event, the primacy and uniform application of Union law<sup>22</sup>, of which the fundamental rights and freedoms represent the third term of the problem. It is a term which cannot be pretermitted, given the fact that these rights and freedoms belong to the perimeter of the values and principles on which the jurisdictions of both Member States and the Union are based. The European Council itself highlights the reciprocal functionality of mutual recognition in criminal judicial cooperation and fundamental human rights, noting that “the protection of the rights of suspected and accused persons in criminal proceedings is a fundamental value of the Union”, and that “it is of paramount importance that law enforcement measures, on the one hand, and measures to safeguard individual rights, the rule of law and international protection rules, on the other, go hand in hand in the same direction and are mutually reinforced”<sup>23</sup>. Along the same lines are the considerations of the Advocate General Cruz Villalón, who believes “that the interpretation to be given of the content and purposes of the Framework Decision [European Ar-

21 On this point, see C. Sotis, La “mossa del cavallo”. La gestione dell’incoerenza nel sistema penale europeo, in Riv. it. dir. proc. pen., 2012, p. 465 ff.; B. Guastaferrri, Beyond the Exceptionalism of Constitutional Conflicts: the Ordinary Functions of the Identity Clause, [www.JeanMonnetProgram.org](http://www.JeanMonnetProgram.org), 01/12; U. Villani, Valori comuni e rilevanza delle identità nazionali e locali nel processo di integrazione europea, Naples, 2011; R. Caponi, Addio ai “controlimiti”? (Per una tutela delle identità nazionali degli Stati membri dell’Unione europea nella cooperazione tra le Corti), in E. Falletti-V. Piccone (ed.), Il nodo gordiano tra diritto nazionale e diritto europeo: il giudice alla ricerca della soluzione, Bari, 2012, p. 43 ff.

22 The triangulation was recognized by the Court of Justice in its judgment of 26 January 2013, Case C-399/11, Melloni.

23 The Stockholm Programme – An open and secure Europe serving and protecting citizens, in the OJEU C 115 of 4 May 2010, p. 1 ff., paragraphs 2.4 and 1.1 respectively.

rest Warrant] must take into consideration all of the objectives sought by the text. Although mutual recognition is an instrument for strengthening the Area of Security, Freedom and Justice, it is equally true that the protection of fundamental rights and freedoms is a precondition which gives legitimacy to the existence and development of this area<sup>24</sup>.

### THE BALANCE BETWEEN THE EU'S NEED FOR SECURITY AND THE IMPERATIVES OF PROVIDING EUROPEAN GUARANTEES.

For the purpose of establishing a European Area of Freedom, Security and Justice, the extremely concise outline we have given of the origins, significance and scope of the principle of mutual recognition within the European context may be seen as a provocation from various points of view. It suggests that we should look at the fundamental question of whether the security approach adopted in the Treaty of Maastricht has caused an imbalance to the disadvantage of respect for human rights and individual freedoms, or that it has been used to rebalance - at least originally - a different kind of imbalance that had already been created within the context of the European integration process. It also suggests we should examine the possibility that this principle could lower the level of guarantees. For this we need to focus on the content of the rules adopted by the European Union. Finally, we need to consider whether - because of mutual recognition and after the introduction of framework aimed at paving the way for the free movement of the accused, for the free movement of evidence, of confiscation orders, and so on - there is a deficit of individual guarantees in the European system. This can be done by looking at case law regarding the application of the principle of mutual recognition.

I shall try to answer each of these issues, or at least make some critical reflections.

### EUROPEAN CITIZENSHIP, FREE MOVEMENT OF PERSONS WITHIN THE EUROPEAN LEGAL AREA AND THE NEEDS FOR A REBALANCE ON THE SECURITY FRONT.

As to the first question, we must first consider that the implementation of the Maastricht Treaty led to the inclusion of a very important political aspect in the integration process. By giving people the *status* of European citizen<sup>25</sup>, movement no longer just regarded production, goods and the judicial decisions concerning them, but also persons as such. The conferment of European citizenship to a national of a Member State is, first and foremost, the conferment of the right to free movement within the European legal area<sup>26</sup>.

Faced with an area freedom that went well beyond the civil law level, there arose the urgent need for security. This broad implementation of the principle of free movement had to be supported by both regulatory and operational measures.

<sup>24</sup> Conclusions adopted in Case C - 306/09, *I.B.*, para. 43.

<sup>25</sup> Article 9 TEU; Article 20, para. 1 TFEU; Article 45, par.1, the Charter of Fundamental Rights of the European Union.

<sup>26</sup> Articles 20, para. 2, letter a, and 21, para. 1 TFEU. On the close connection between freedom of movement and nationality in the European Union see B. Nascimbene, F. Rossi Dal Pozzo, *Diritti di cittadinanza e libera circolazione nell'Unione europea*, Padua, 2012, p. 79 ff.; C. Morviducci, *I diritti dei cittadini europei*, Torino, 2010, p. 3 ff.; A. Tizzano, *Alle origini della cittadinanza europea*, in *Dir. Un. eur.*, 2010, p. 1031 ff.; S. O'Leary, *The Evolving Concept of Community Citizenship*, The Hague, 1986.

I might add that according to many different authorities this need for security was realized too late. Consider, by way of example, the opinions of the French Conseil d'État, when it recognized that only in the nineteen nineties did EU Member States realize "de la *difficulté éprouvée par le systèmes repressifs nationaux [individuellement considérés]* à rechercher, poursuivre et renvoyer en jugement les auteurs de crimes ou de délits dont certains éléments constitutifs ont été commis dans plusieurs États membres"<sup>27</sup> and, consequently, the need for the national criminal law authorities to work together. The Conseil d'État underlined the opinion of the French National Assembly, in the early years of this century, that it was "temps de mettre un terme à ce *déséquilibre* de la construction européen" by strengthening the sphere of judicial cooperation in criminal law<sup>28</sup>. In more recent times, and in regard to the protection of the financial interests of the Union, the European Parliament highlighted that the *Union's delay* in acting on the security front was due to the absence of shared spheres of action for national criminal law authorities to work in<sup>29</sup>.

Let me add that not only was this need for rebalance realized late but also no immediate action was taken to remedy the situation with appropriate measures. In this regard, the Union initially adopted a very timid approach with the Maastricht Treaty, which provides for intergovernmental consultation. From a qualitative point of view, this does not seem to represent any sort of break with what had been done for the past forty years in the framework of the Council of Europe, though it is true it would now take place within a fairly robust institutional and no longer merely diplomatic framework<sup>30</sup>. It is only with the Treaty of Amsterdam that the perspective changes. Member states were determined to give the EU a regulatory responsibility (albeit not exclusive) in the fight against criminal behaviour and the coordination of criminal law enforcement authorities within Member States, in accordance with tripartite procedures which are still in place: judicial cooperation among national authorities through the principle of mutual recognition (albeit not exclusively)<sup>31</sup>, approximation or harmonization<sup>32</sup> of national legislation, and integrated judicial cooperation<sup>33</sup>.

27 *Réflexions sur l'institution d'un parquet européen*, Étude adopté le 24 février 2011 par l'Assemblée générale plénière du Conseil d'État, Paris, 2011, p. 20 (italics added).

28 R. André, J. Floch, *Rapport d'information* (n. 445) *sur la création d'un procureur européen*, déposé par la délégation de l'Assemblée nationale pour l'Union européenne, <http://www.assemblee-nationale.fr/12/europe/rap-info/i0445.asp> (italics added).

29 This is what is derived from a general reading of the resolution of 6 May 2010 on the *protection of the Communities' financial interests and the fight against fraud* - Annual Report 2008, paragraphs 3 and 30-34.

30 On the institutional aspects of the earliest forms of judicial cooperation in criminal matters as of the Treaty of the European Union (Maastricht version), see N. Parisi, *Il "terzo pilastro" dell'Unione europea*, in N. Parisi, D. Rinoldi, *Giustizia e affari interni nell'Unione europea (il terzo pilastro del Trattato di Maastricht)*, Turin, 1996, p. 25 ff.; on the amendments thereto by the Treaty of Amsterdam see (in very succinct terms) Appendix. *The "third pillar" of the Treaty of the Union between Maastricht and Amsterdam*, *ibid* (ed. 1998), p. 292 ff.

31 Traditional forms of assistance and judicial cooperation (though modernized) persist in relations among criminal justice authorities of Member States; in this regard see A. Damato, P. De Pasquale, N. Parisi, *Argomenti di diritto penale europeo*, Turin 2013, Chapter I.A.

32 EU treaties use the two terms in such a way that a distinguishing criterion between them cannot be found. On this point, see the considerations of D. Rinoldi, *Lo spazio* (2012), cit., Chap. IV, para. 64.

33 Thus L. Salazar, *La lotta alla criminalità nell'Unione: passi in avanti verso uno spazio giudiziario comune prima e dopo la Costituzione per l'Europa ed il programma dell'Aja*, in *Cass. pen.*, 2004, p. 3510 ff.; *Id.*, *Presente e futuro dello spazio di libertà, sicurezza e giustizia: dal Piano d'azione dell'Aja alla "visione" della Commissione europea*, in G. Grasso, R. Sicurella (ed.), *Per un rilancio del progetto europeo. Esigenze di tutela degli interessi comunitari e nuove strategie di integrazione penale*, Milan, 2008, p. 625 ff.

Therefore, the EU's approach to security originated from the need not only to tackle structurally modified criminality<sup>34</sup> but also to balance a system of cooperation which, as the process of European integration developed, had lost its harmony.

### PRINCIPLE OF MUTUAL RECOGNITION AND RESPECT OF FUNDAMENTAL RIGHTS AND FREEDOMS IN THE ADMINISTRATION OF CRIMINAL JUSTICE: EUROPEAN LAW

As for the second question, in their efforts to create an Area of Freedom, Security and Justice within the Union, European and national institutions have always sought to transfer the principle of mutual recognition from the context of the internal market (including juridical relations aimed at solving operational conflicts of law and jurisdiction) to the fight against conducts harmful to the internal security of Member States and the Union through the instrument of coordination and cooperation in criminal proceedings. This choice has, in time, also characterised other sectors of the Area of Freedom, Security and Justice, such as police cooperation, where mutual recognition is applied to relations between national authorities through, for example, the acceptance of the principle of availability of information<sup>35</sup>, or the international protection of person, for whom Union law presupposes the mutual recognition of decisions on status made by the Member State that adopts, for all EU Member States, a "visa" or decision allowing transit or entry for an intended stay in that Member State or in several Member States<sup>36</sup>.

There is also substantial support for this approach in doctrine<sup>37</sup>.

Other experts have, conversely, expressed a "position that is strongly opposed [or which is "alternative"] to the prevailing trends (...) in the Europeanization of criminal law and criminal procedural law"<sup>38</sup>. In their opinion, some of the most serious problems with mutual recognition include the substantiation of "hybrid criminal proceedings which allows for a combination of interventions by the different national jurisdictions involved in the same proceedings", "the emergence of a radically punitive criminal justice"<sup>39</sup>, and an inherent capacity to violate the principle of strict legality in criminal law<sup>40</sup>. Consequently, it has been suggested that the principle of mutual recognition be abandoned in favour of other solutions. One is a combination of two different techniques: the principle of more favourable treatment (for the person in-

34 N. Parisi, *Su taluni limiti*, cit., pp. 446-447.

35 For regulatory references, see N. Parisi, Article 87 TFUE (commento), in A. Tizzano, *Trattati dell'Unione europea*, Milan, 20142, para. III.

36 Articles 31 and 2, letter m (as well as recitals nos. 4-5) of Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013, which sets out the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person, in OJEU L 180 of 29 June 2013, p. 31 ff.

37 I remember in particular U. Sieber, *Europäische Einigung und Europäisches Strafrecht*, in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 1991, pp. 962-963, who was already proposing the use of this principle for matters relating to the movement of criminal evidence; more generally, see (in addition to those mentioned above, note 1, 7 and 14) M. Möstl, *Preconditions and Limits of Mutual Recognition*, in *Common Market Law Review*, 2010, p. 405 ff.; the books edited by G. de Kerchove, A. Weyembergh, *Quelle réforme pour l'espace pénal européen*, Brussels, 2003; Idd., *L'espace pénal européen: enjeux et perspectives*, Brussels, 2002; Idd., *La reconnaissance mutuelle des décisions judiciaires pénales dans l'Union européenne*, Brussels, 2001; e D. Rinoldi, *Lo "spazio" (2012)*, cit., pp. 18 s. e 64 ff.

38 Thus B. Schünemann, *Presentazione*, in Id., *Un progetto alternativo di giustizia penale europea*, Milan, 2007, p. 3.

39 *Ibid.*, p. 7.

40 *Ibid.*, pp. 6-7 e 9.

volved in criminal proceedings) and the “Swiss model” (for determining the trial court).

Others have focused on the possible problems that could arise from the EU’s regulatory activity and its effects on criminal matters. In particular, criticism is levelled at the questionable choices of legislative policy aimed at transposing the principle of mutual recognition - considered as the best way to ensure a properly functioning European internal market – to areas such as criminal law, the rules of which have a profound effect on the statute of people, in the absence of a process of harmonization of criminal and procedural laws in Member States and of a genuinely democratic process for the formation of European legislation<sup>41</sup>.

The opposition or reluctance to the use of this principle for building a European area of criminal justice is not due to captious or wayward concerns. These views have highlighted the problematic nature of implementing the principle of mutual recognition in Member States (or rather among authorities belonging to different national legal systems) in situations where differences in the regulation of positive law on guarantees are anything but slight.

Although European Union institutions cannot but accept the political choice made of Member States to constitutionalize the principle of mutual recognition in the Treaty of Union, they do not hide the problematic aspects that have resulted from its use in the field of criminal and police cooperation. In particular, the Commission has long expressed concerns that the principle of mutual recognition – naturally aimed at extending the powers of prosecutors, magistrates and prosecuting authorities - might determine antinomic legal solutions in the pursuit of two different implied needs: the efficient administration of criminal justice and respect for the procedural safeguards of the person in a single judicial area. To improve the process of judicial cooperation among the criminal courts of Member States, a process of harmonization of national legal systems was launched, which, after a long initial *impasse*<sup>42</sup>, seems to have taken off with the so-called *Road Map* adopted by the Council in 2009<sup>43</sup>.

41 We refer once again to U. Draetta, *Diritto dell’Unione europea e principi fondamentali dell’ordinamento costituzionale italiano: un contrasto non più solo teorico*, in *Il Diritto dell’Unione Europea*, 2007, p. 995 ff.; Id., *Il mandato d’arresto europeo al vaglio della Corte di giustizia*, in *Rivista di diritto internazionale privato e processuale*, 2007, p. 995 ff. On the problems (though widely reputed to have been resolved) raised by the attribution of legislative competence in criminal matters to the EU, see also F. Sgubbi, *Principio di legalità e singole incriminazioni*, in L. Picotti (ed.), *Possibilità e limiti di un diritto penale dell’Unione europea*, Milan, 1999, p. 152 ff.; M. D’Amico, *Lo spazio di libertà, sicurezza, giustizia e i suoi riflessi sulla formazione di un diritto penale europeo*, in A. Lucarelli, A. Patroni Griffi (ed.), *Studi sulla Costituzione europea. Percorsi e ipotesi*, Naples, 2003, p. 191 ff.; A. Bernardi, *Europeizzazione del diritto penale e progetto di Costituzione europea*, in *Diritto penale e processo*, 2004, p. 5 ff.

42 Commission Green Paper of 19 February 2003 *Procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union*, COM (2003) 75 final, paragraph 14, which refers to the Commission communication of 14 July 1998, *Towards an Area of Freedom, Security and Justice*, COM (1998) 459 final.

43 The Road Map, adopted on 30 November 2009 (OJEU C 295 of 4 December 2009), was followed by the adoption of two directives (2010/64/EU on the right to interpretation and translation; 2012/13/EU on the right to information) and a proposal for a Directive on the right of access to a lawyer in criminal proceedings and the right to communicate upon arrest COM (2011) 326 final. 8 June 2011. The Road Map also provides for the adoption of rules for communication with relatives, employers and consular authorities (Measure D), with special safeguards for vulnerable suspects and defendants (Measure E), as well as a green paper on pre-trial detention (Measure F). On the topic, see M. Pedrazzi, I. Viarengo, A. Lang (eds.), *Garanties individuelles dans l’espace judiciaire européen en matière pénale*, Brussels, 2011; oltre al mio *Tecniche di costruzione di uno spazio penale europeo. In tema di riconoscimento reciproco delle decisioni giudiziarie e di armonizzazione delle garanzie procedurali*, in *St. int. eur.*, 2012, p. 33 ff. For criticism of the application of mutual recognition in the field of procedural safeguards, see M. Kaiafa-Gbandi, *Harmonisation of Criminal Procedure on the Basis of Common Principles. The Eu’s Challenge for rule-of-law Transnational Crime Control*, in C. Fijnaut, J. Ouwerkerk, *The Future of Police and Judicial Cooperation in the European Union*, Leiden-Boston, 2010, p. 370 ff.

Consider also the field of detention and, especially, custody. Although it is a *measure of an exceptional nature* in the judicial systems of all Member States<sup>44</sup>, the regulatory differences are by no means small, at least with regard to duration and review of the reasons for using it rather than other (also precautionary but) non-custodial measures<sup>45</sup>.

Consider, also, the circulation of data for the prevention and detection of crime. Again, the EU Commission highlighted the risks to privacy of the widespread use of computer technology for the collection of large quantities of personal information, which is then transferred from one database to another. Moreover, the principles of due process might be affected by the exchange of information: from *intelligence* authorities to the police and then, perhaps, also to criminal prosecution authorities, and so on<sup>46</sup>. Precisely because EU institutions are aware of these problems, they have embarked on a comprehensive reform of the entire legal regime for the processing of personal data, on the basis of the mandate expressed in Article 16 of the Treaty on the Functioning of the European Union (Lisbon revision), both as regards cases of civil and administrative law, and in police and judicial criminal law cooperation<sup>47</sup>. However, it is still much too early to make even a minimal assessment of its controversial content. It focuses, though, on the protection of the rights of persons who, in various capacities, are involved in police cooperation procedures between authorities of Member States and between them and EU offices and authorities<sup>48</sup>. This review has also been fuelled by criticism in the case law of the European Courts<sup>49</sup>, as well as the activities of the “Article 29” Working Party<sup>50</sup>.

44 Communication of the Commission of 14 June 2011 *Strengthening mutual trust in the European judicial area - A Green Paper on the application of EU criminal justice legislation in the field of detention*, COM (2011) 327 final, p. 9 (italics added).

45 The operation of the different legal status of the pre-trial detention measures in two EU Member States (Italy and Germany) in spite of mutual recognition (specifically for the enforcement of a European arrest warrant) was the focus of the Court of Cassation Judgment of 30 January 2007, no. 4614, *Ramoci*.

46 In this regard, see Communication (adopted January 25, 2012) from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on *Safeguarding privacy in a connected world. A European framework of data protection for the twenty-first century*, COM (2012) 09 final, p. 13.

47 In this regard, in addition to the Communication cited in the previous note, see also the Communications (adopted on the same date) of the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the *Proposal for a Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection and prosecution of criminal offenses or the execution of criminal penalties, and the free movement of such data*, COM (2012) 10 final.

48 See COM (2012) 09 final, cit., p. 13.

49 European Court of Human Rights, judgment of 4 December 2008, application no. 30562/04, *S. and Marper*, see UK (Infringement of privacy determined by the use of DNA for investigative purposes and the exchange of genetic data in the framework of police cooperation initiated by the Prüm Treaty and the decisions of the European Union); the Court of Justice of the European Union, judgment of 20 November 2010 in Joined Cases C-92/09 and C-93/09, *Völker / Markus Schecke GbR and Eifert* (which addresses the issue of the balance between the right to protection of personal data and of general interests, in this case concerning the need to ensure transparency in the allocation of EU funding).

50 See, among others, *The Future of Privacy. Joint Contribution to the Consultation of the European Commission on the Legal Framework for the Fundamental Rights to Protection of Personal Data*, 1 December 2009, 02356/09/EN, WP 168; *Parere 10/2011 sulla proposta di direttiva del Parlamento europeo e del Consiglio sull'uso dei dati del codice di prenotazione ai fini di prevenzione, accertamento, indagine e azione penale nei confronti dei reati di terrorismo e dei reati gravi*, 5 aprile 2011, 00664/11/IT, WP 181; *Opinion of the European Data Protection Supervisor on the Joint Communication of the Commission and of the High representative of the European Union for Foreign Affairs and Security Policy on a “Cyber Security Strategy of the European Union: an Open, Safe and Secure Cyberspace”, and on the Commission proposal for a Directive concerning measures to ensure a high common level of network and information security across the Union*, 14 June 2013, paragraphs 31-34. Specifically in relation to the problem of terrorism, see Cian C. Murphy, *EU Counter-Terrorism Law. Pre-Emption and the Rule of Law*, Oxford-Portland, 2012, p. 147 ff.; M. Nino, *Terrorismo internazionale, privacy e protezione dei dati personali*, Naples, 2012, specific. pp. 21 ff. and 178 ff.; S. De Vido, *Il contrasto del finanziamento al terrorismo internazionale. Profili di diritto internazionale e dell'Unione europea*, Padua, 2012, p. 268 f. For a more general view of the issue, see F. Boehm, *Information Sharing and Data Protection in the Area of Freedom, Security and Justice*, Berlin-Heidelberg, 2012; and M. Kaiafa-Gbandi, *Harmonisation of Criminal Procedure on the Basis of Common Principles*, cit., pp. 366-369.



If we look at the EU's instruments for implementing the principle of mutual recognition, one cannot fail to appreciate that the underlying design is also functional to the improvement of human rights.

Considering again the Framework Decision on the European arrest warrant, the rules contained therein cut out the political and administrative phase in the co-operation process (replaced by the pre-existing assumed mutual trust among jurisdictions). This provides better protection for the accused or the convicted, reducing the duration of trials<sup>51</sup> and contributing to the requirements of due process with which the jurisdictions of all EU Member States must comply<sup>52</sup>. Moreover, this is not accompanied by a lowering of legal guarantees, which in Union acts – in accordance with conventional practice, used also by the Italian legal system<sup>53</sup> – is modelled on well-established instruments of judicial cooperation between national criminal authorities. So it does not seem out of place that the guarantee system is “rather thin”<sup>54</sup> in the Framework Decision on the European arrest warrant<sup>55</sup>. Of course, a framework decision with such a significant title and being the first trial run of mutual recognition in criminal matters, reasons of political expediency would have recommended a greater verbosity on the subject. Nevertheless, the conciseness responds to the logic of the legal instrument used, which is intended to give Member States the responsibility for identifying the level of protection to be applied during the execution of measures, since the Framework Decision has no direct effect on national legal systems<sup>56</sup>. Although sparing in words, the framework decision is sufficiently peremptory, stating that it “shall not have the effect of modifying the obligation to respect fundamental rights”<sup>57</sup>. This leads to the conclusion that in addition to the grounds for mandatory non-execution of the warrant set forth in Article 3, there is another: the risk that the execution of the warrant could constitute an infringement of the fundamental rights of the person by the state issuing the warrant<sup>58</sup>.

Furthermore, the speeding up of the procedure – due to the removal of the po-

51 Thus the Commission, also, considering the praxis in Member States as of January 1, 2004, date of expiry for the execution of the Framework Decision on the European Arrest Warrant: COM (2005) 63 final, pp. 4-6. The shortening of the procedure was also implemented by Framework Decision 2008/978/JHA on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, in OJEU L 350, December 30, 2008, p. 72 ff.

52 Article 47, para. 1, EU Charter of Fundamental Rights, Article 6 ECHR, Article 14 International Covenant on Civil and Political Rights.

53 On this subject, see N. Parisi, *Italy (Report)*, in Ch. Blakesley, A. Eser, O. Lagodny (eds.), *The Individual as Subject of International Cooperation in Criminal Matters*, Baden-Baden, 2001, p. 293 ff.; on the progressive jurisdictionalization of the procedures for judicial cooperation between national criminal authorities see my *Note sul concorrente ruolo di autorità esecutive e giudiziarie nell'esecuzione di obblighi internazionali in materia penale*, in G. Ziccardi Capaldo (ed.), *Attuazione dei trattati internazionali e costituzione italiana. Una riforma prioritaria nell'era della comunità globale*, Naples, 2003, p. 309 ff.

54 I. Viarengo, *Mandato d'arresto europeo e diritti fondamentali*, in M. Pedrazzi (ed.), *Mandato d'arresto europeo e garanzie della persona*, Milan, 2004, p. 149.

55 M. Pedrazzi, *Considerazioni introduttive*, in Id. (ed.), *Mandato*, cit., p. 5.

56 On the respective function of the Framework Decision and national regulatory compliance, see my *Principio di legalità e tutela dei diritti della persona nello “spazio di libertà, sicurezza e giustizia*, in L. Daniele (ed.), *La dimensione internazionale ed europea del diritto nell'esperienza della Corte costituzionale*, Naples, 2007, p. 353 ff.; moreover an identical view point is expressed by Advocate General Sharpston in the conclusions adopted in Case C-60/12

57 Article 1, para. 3, framework decision, accompanied by recitals 10, 12, 13 and 14 of the same.

58 However, see below, text at note 99, about the different standards of respect for fundamental rights and freedoms involved in the activity of judicial cooperation in criminal law as compared to those relating to the determination of criminal responsibility

litical and administrative phase and the provision for rapid execution of the request - results in greater protection for victims, who – in accordance with the principle of the centrality of the person, which is widespread in our legal system<sup>59</sup> - must receive guarantees for his or her infringed rights and freedoms within a reasonable time. In this regard, we may note that the principle of mutual recognition could be used more pervasively to give extraterritorial effectiveness (within the area of freedom, security and justice) to the measures taken by the judicial authorities of a State to indemnify victims of unlawful arrest or detention. Already today, when these measures are taken and executed, EU Member States are obliged to provide assistance<sup>60</sup>. In the application of the principle of mutual recognition, the level of protection would be greater if indemnification were provided by the State requesting the measure restricting personal liberty<sup>61</sup>.

Similar considerations arise in relation to the EU instrument that applies mutual recognition to the circulation of supervision measures as an alternative to provisional detention<sup>62</sup>. The regulation in question is based on the assumption that the jurisdictions of EU Member States consider provisional detention awaiting trial an exceptional measure, applied to non-residents but replaced by alternative measures for citizens and habitual residents. It follows that if the application of the latter is transferred to the State of habitual residence of the suspect – in accordance with the European Union proposal – three different outcomes would ensue: a reduction of the risk of unequal treatment; application of the supervision measures to the suspect's usual place of residence, thus a step forward in the humanization of punishment<sup>63</sup>; full implementation of the principle of presumption of innocence.

In trying to solve positive conflicts of jurisdiction in criminal matters, the European regulation that articulates the European *ne bis in idem* principle also provides a guarantee<sup>64</sup> - already codified in Article 50 of the Nice Charter of Fundamental Rights<sup>65</sup> - protecting a person from being subjected to multiple restrictive measures as a result of various national proceedings regarding the same judicial area.

The purpose of providing guarantees is also pursued by the framework decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of

59 I refer to Article 2 of the Italian Constitution, as well as the guiding principles contained in the delegated law of the Code of Criminal Procedure.

60 Article 49 Conv. applying the Schengen Agreement.

61 This situation is recommended in the Recommendation of the Committee of Ministers of the Council of Europe no. R (86) 13.

62 Framework Decision 2009/829/JHA of 23 October 2009 *on the application between the Member States of the European Union the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention*, in OJEU L 294 of 11 November 2009, p. 20 ff.

63 In this way, the Commission justifies the need to proceed in this matter with a Union act: see the *Green paper on mutual recognition of non-custodial pre-trial supervision measures*, August 17, 2004, COM (2004) 562 final, paragraphs 11 and 13.

64 Framework Decision 2009/948/JHA of 30 November 2009 *on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings*, in OJEU L 328 of 15 December 2009, p. 42 ff.

65 The principle had already been incorporated in the Convention implementing the Schengen Agreement (Article 54), the Convention on the protection of the financial interests of the European Communities (Article 7), its First Protocol (Article 7), and the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (Article 10).

liberty for the purpose of their enforcement in the European Union<sup>66</sup>. Consider, for example, the fact that the transmission of the judgment is conditioned, among other things, by the circumstance that the competent authorities of the issuing state should make sure that “enforcement of the sentence in the executing State enhances the possibility of social rehabilitation of the sentenced person”<sup>67</sup>. Consider, also, that it specifically establishes a consultation phase between the authorities of the issuing and executing states, during which the latter may adopt a reasoned opinion explaining why it believes that executing the sentence in its territory would not enhance the social rehabilitation of the person in question<sup>68</sup>.

A similar guarantee purpose lies behind the new regulation on the application for international protection, established in Regulation (EU) 604/2013<sup>69</sup>. Consider that it envisages a personal interview with the applicant to facilitate the determination of the Member State responsible for examining an application<sup>70</sup>; it excludes the indiscriminate use of detention and establishes procedures for this purpose<sup>71</sup>; it deals extensively with the processing of personal data<sup>72</sup>; it lays down principles about legal safeguards and effective remedies<sup>73</sup>; it sets specific rules for the protection of family life<sup>74</sup> and the best interests of the child<sup>75</sup>.

What is certain is that the progressive extension of the principle of mutual recognition requires continuous monitoring, especially as concerns the consequences that it could determine on the status of the person involved in criminal proceedings. As cooperation between national authorities deepens, speeds up and becomes more fluid, gradually abandoning or simplifying the traditional channels of mutual assistance, new guarantee needs emerge, for which regulatory solutions will need to be immediately ‘invented’. It is in this sense that on-going regulatory activity should be interpreted, in which, from different perspectives, “reinforcing mutual trust is the key to making MR operate smoothly”<sup>76</sup>. One way would be to adopt measures of substantive criminal law, directed at establishing uniform criminal typologies<sup>77</sup>. A second way is through in the directives for the approximation of the procedural law of Member States, initiated with the *Road Map* of the Council of 30 November 2010<sup>78</sup>, as well as the measures for the administration of justice, such as the strengthening of assessment mechanisms, the enhancement of judicial training for legal practitioners, “networking”, support for the development

66 Council Framework Decision 2008/909/JHA of 27 November 2008 on the 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, in OJEU L 327, of 5 December 2008, p. 27 ff.

67 Article 4, para. 2.

68 Article 4, para. 3 e 4.

69 Regulation (EU) No. 604/2013 of 6 June 2013, cit.

70 Article 5.

71 Article 28.

72 Articles 31-32, 34, 38-39.

73 Articles 26-27.

74 Articles 9-11 and 16.

75 Articles 6 and 8.

76 Communication the Commission to the Council and the European Parliament on mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States, SEC (2005) 641, May 19, 2005, para. 18, and Council Decision of 12 February 2007, 2007/126/JHA, in OJEU L 58 of 24 February 2007, p. 13 ff.

77 The Union’s competence in question is based on Article. 83 TFEU.

78 See above, note 43.

of quality justice. Finally, mention should be made of the “self-correcting” capacity of the European Union system when legislation has failed to protect the rights of a person involved in criminal proceedings. A paradigmatic case is the Framework Decision 2009/299/JHA, which modified a number of framework decisions applying the principle of mutual recognition<sup>79</sup>, with the aim of harmonizing the reasons for non-recognition of decisions rendered in the absence of the person concerned in court.

### CASE-LAW APPLYING THE PRINCIPLE OF MUTUAL RECOGNITION

The aforementioned concerns expressed by doctrine are not just based on theory. They derive from the problems that emerge when European legislation is adapted and applied in national legal systems. This is well demonstrated by the complexity underlying the abundant European and national case law resulting from requests to execute judicial decisions based on the principle in question. Despite the fact that the solutions are not always convergent<sup>80</sup>, it has nevertheless contributed greatly to the process of adapting national legal systems to the requirements of mutual recognition and the full respect of human rights.

We can use this case-law to reflect on how the principle of mutual recognition can lower the level of protection for individual rights, which in Europe originate from values and principles that are part of the common constitutional traditions of Member States, expressed in the Charter of Fundamental Rights and the European Convention on Human Rights<sup>81</sup>, and by virtue of the latter protected within the national legal systems. The concrete appreciation of the principles and the rules vary from one jurisdiction to another (even those that guarantee a fundamental right), given that their scope has to be evaluated on a case by case basis in the light of the whole regulatory environment in which they are intended to operate<sup>82</sup>. So much so that the EU Treaty itself makes it clear that, while sharing the same values, the (juridical) identity of each of its Member States (and that of the Union) must be safeguarded.

First of all, on a very general level - and mainly taking our example from Italian practice – we cannot fail to note that it is a constant in case law to stress the

79 Framework Decision of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, *thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial* (OJEU L 81 of 27 March 2009, p. 24 ff.).

80 As regards the “process of profound transfiguration of the role of the judge” following the “revolution in the system of sources” applicable within national boundaries and, consequently, on the “difficulty of finding one’s bearings (...) having to overcome regulatory bifurcations or legislative crossroads, always facing a choice or a “dilemma” (...) tracing the irregular geometry of “consistent interpretation”, constantly in dialogue with supranational courts, rebuilding precepts and sanctions rhapsodically, weighing rights and obligations, even creating a difficult decoupage of domestic legislation, not applying laws or appealing to a judge. This is all done by questioning sources that are light years away from the desk (...), in a combinatorial search which (...) can be spatially unlimited (...)”, see Manes, *Il giudice nel labirinto*, Roma (Dike), 2012, pp. 3-4.

81 The words in the text were the same as those used by the Constitutional Court in its judgment of 11 April 2002, no. 135

82 In this regard mention should be made of the recent judgment of the Court of Justice, which, in assessing the scope of the principle that no person may be subjected to torture practices, or inhuman and degrading treatment and punishment, states that this principle has its own qualification in the Union (independent of those used in Member States and in the European Convention for Protection), which depends on its subsumption into their legislative acts (which certainly cannot conflict with the general principles of the Union, to which belong the principles expressed in the Convention on Human Rights: see judgment of the Court of Justice of 9 November 2010, *B. and D.*, Joined Cases C-57/09 and C-101/09, p. to 99.

need for alleged antinomies to be resolved, initially, at the hermeneutic level, and that national courts must interpret domestic law in conformity with EU law, as well as with international law, such as the Convention for the Protection of individual rights<sup>83</sup>. Thus, it was recognized that a constitutionally protected principle could be affected (without changing the Constitution) by extensive interpretations of the European charters<sup>84</sup>.

In cases where it not be possible to pursue this virtuous path, there are two parameters that can help solve ascertained antinomies: international charters which do not preclude greater protection than that provided by national laws; the fact that states have constitutions that are not only open to the acceptance of international values in the domestic legal system<sup>85</sup> but also have the capacity, as declared by domestic supreme courts, for extensive and evolutionary interpretation so as to grant a person the best possible protection of their rights, by virtue of “the interpenetration of the protections provided by (...) [domestic and international] rules. In short, “the ascertainment of a guarantee deficit must (...) be made in comparison with an existing and legally available higher level on the basis of continuous and dynamic integration of the parameter of compliance with international obligations, as provided for in the first paragraph of Article 117 of the Italian Constitution”<sup>86</sup>. In this regard consider Constitutional Court judgment no. 113/2011: at the general level, it integrates Article 630 of the Code of Criminal Procedure as regards convictions, “A case should be reopened, when it has (...) to comply with a final judgment of the European Court of Human Rights” which conflicts with an Italian criminal judgement<sup>87</sup>. Moreover, the German Constitutional Court, too, has taken a similar line, stating that the commitment of the Basic Law to international law is an expression of sovereignty that not only does not preclude involvement in international and supra-national contexts and their further development, but requires and expects this<sup>88</sup>.

83 The leading case on the subject in relation to criminal matters is the judgment of the EC Court of Justice 16 June 2005, *Pupino*, cit.; plus the judgments of the Constitutional Court., Judgment of 11 March 2011, no. 80, and Court of Cassation November 12, 2008, no. 45807, *Drassich*.

84 Judgment of the Constitutional Court of 15 April 2010, no. 138, paragraph 10 (in this case, it was a question of assessing whether the guarantee of privacy can also be extended to the protection of the marriage of persons of the same sex).

85 Expressed in the Constitution of the Republic, primarily in Articles. 7, 10, 11 and 1171.

86 Judgment of the Constitutional Court of 30 November 2009 no. 317, paragraph 7 (italics added). The Court argues that “the integration of the constitutional parameter represented by the first clause of Article 117 of the Constitution shall not be construed as a hierarchical superordination of ECHR rules (...) as regards ordinary laws and, much less, the Constitution. With reference to a fundamental right, the respect of international obligations can never lead to a lessening of protection than those already set by domestic law, but *can and must, instead, be an effective tool for the extension of protection itself*”, concluding that “the final evaluation as to the actual degree of protection in individual cases is the result of a *virtuous combination* between the obligation of the national law makers to adapt to the principles laid down by the ECHR (...), an obligation that is also incumbent on the ordinary judge to give domestic rules an interpretation that complies with ECHR requirements and the obligation that rests ultimately on the Constitutional Court – should it not be possible to agree on a compliant interpretation - to not allow a provision to continue to have effect in Italian law if its lack of protection of a fundamental right has not been satisfactorily established” (paragraph 7; italics added).

87 See judgment of 7 April 2011, no. 113.

88 Thus the judgment of the Federal Constitutional Court on 4 May 2011 (2BvR in 2365/09), “Die Völkerrechtsfreundlichkeit Grundgesetzes ist des (...) Ausdruck eines Souveränitätsverständnisses, das und einer Einbindung in inter-supranationale Zusammenhänge sowie deren Weiterentwicklung nicht nur nicht entgegensteht, sondern voraussetzt und diese erwartet” (“see the press release summarizing the reasons in English <http://www.bundesverfassungsgericht.de/en/press/bvg11-031en.html>). On the ruling - which relates to the precautionary measures and the relationship between the German Basic Law and the European Convention on Human Rights – see B. Peters, *Germany’s Dialogue with Strasbourg: Extrapolating the Bundesverfassungsgericht’s Relationship with the European Court of Human Rights in the Preventive Detention Decision*, in *Germ. Law Journ.*, 2012, p. 757 ff.; e A. Ruggeri, *Rapporti tra CEDU e diritto interno: Bundesverfassungsgerichts e Corte costituzionale allo specchio*, in [www.diritticomparati.it](http://www.diritticomparati.it).

In the words of the Italian Court of Cassation we have an “integrated system of constitutional, EU and international sources of law”<sup>89</sup> - or according to the Italian Constitutional Court – internal and international sources for the protection of fundamental rights of the person that are on an equal footing<sup>90</sup>. This case law was also anticipated in the past, and the expression “pluralisme ordonné” was used in reference to domestic and international sources of law<sup>91</sup>.

From what we have seen so far, it is not a case of making an abstract decision about which legal system (international, European or national) should have the last say in the provision of guarantees, or which is hierarchically superior<sup>92</sup>, but rather to identify, case by case, how all these rules of different derivation can be interpenetrated. In the event this result cannot be achieved, we have to identify which, among all those that are abstractly relevant, provides the best protection for the person, this being the ultimate goal to be pursued in a system based on the primacy of law. This quest for the highest level of protection lies with the domestic courts. It is the judges deciding on concrete cases that have to apply the rule in actuality<sup>93</sup>.

However, the requirement of having to apply the best level of protection under Article 53 of the Charter of Fundamental Rights of the European Union is conditioned by two factors. First, when using hermeneutical tools, the result obtained cannot determine an application of the European law *contra legem*<sup>94</sup>. Second, the protection of the person must be balanced with the requirements of international judicial cooperation and the need to fight crime.

In this regard, mention should be made of some past judgements of the Court of Human Rights, from which we learn, for example, that under the Protection Convention “no right to be extradited is as *such* protected”<sup>95</sup>: “the Convention (...) cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State may not surrender an individual

89 Judgment of the Court Cass., sez. un., 25 October 2010, *Nwabanne Pauline Ahiaoma*, paragraph 5. On this point, we may refer to some of the numerous contributions on the subject by A. Tizzano, quali *Ancora sui rapporti tra Corti europee: principi comunitari e c.d. controlli costituzionali*, in *Dir. Un. eur.*, 2007, p. 734 ff.; *Alle origini della cittadinanza europea*, in *Dir. Un. eur.*, 2010, p. 1040 s.; *Introduzione alla sessione: La tutela dei diritti nell'Unione europea*, in N. Parisi., see Petralia (ed.), *L'Unione europea dopo il Trattato di Lisbona*, cit., p. 161 ff.; G. de Amicis, E. Vincenti, *Rapporti tra la giurisprudenza della Corte di cassazione e la giurisprudenza della Corte EDU*, *Relazione tematica n. 65*, 7 luglio 2011 (Ufficio del Massimario e del Ruolo della Corte Suprema di Cassazione), para. 3.2.

90 In its judgment of 12 December 2011, no. 329, the Court considers the right of the child to attendance allowance to be protected, as under Law of 11 October 1990 n. 289, “as well as by the Constitution, also by the constraints deriving from EU and international obligations” (paragraph 1, 4th para in the “In diritto” section; italics added), with the judgment rendered on the same date no. 338, the Court states that, in the context of the principles that require the respect of the “fair balance between the general interest and the protection of fundamental rights of individuals”, the national law in force (Article 161 dlgs. December 30, 1992, No. 504) “violates both Article 42, third paragraph, of the Constitution, and Article 117, first paragraph, of the Constitution in relation to Article 1 of the first additional Protocol to the ECHR” (paragraph 71 of the “In diritto” section; italics added).

91 Thus M. Delmas-Marty, *Le pluralisme ordonné. Les forces imaginantes du droit*, Paris, 2006.

92 For a similar approach, see A. Ruggeri, *Interpretazione conforme e tutela dei diritti fondamentali, tra internazionalizzazione (ed “europeizzazione”) della Costituzione e costituzionalizzazione del diritto internazionale e del diritto eurounitario*”, <http://www.associazionedeicostituzionalisti.it/rivista/2010/00/RUGGERI01.pdf>; and Piccone, *Il regime di responsabilità civile del magistrato*, in *I quaderni europei*, [www.lex.unict.it/cde/quadernieuropei](http://www.lex.unict.it/cde/quadernieuropei), no. 35/2011.

93 This process has been examined by, amongst others, A. Ruggeri, *Dimensione europea della tutela dei diritti fondamentali e tecniche interpretative*, in *Dir. Un. eur.*, 2010, p. 125 ff.; H. Senden, *Interpretation of fundamental rights in a multilevel legal system. An Analysis of the European Court of Human Rights and the Court of Justice of the European Union*, Cambridge, 2011; A. Cardone, *La tutela multilivello dei diritti fondamentali*, Milan, 2012.

94 Thus, the judgment of the EC Court of Justice 16 June 2005, *Pupino*, cited above.

95 Judgment of 7 July 1989, *Soering*, see *UK*, paragraph 85 (italics added).

unless satisfied that the conditions awaiting him in the Country of destination are in *full accord with each* of the safeguards<sup>96</sup>. This means that, unless there are violations of rules safeguarding absolute rights<sup>97</sup>, the protection of the person involved in the judicial cooperation procedure can be at a lower level, provided that it “reflects (...) the consensus reached by all the Member States regarding the scope given under EU law to the [fundamental] rights” involved<sup>98</sup>, a consensus found to be “compatible with the requirements deriving from ... the Charter”<sup>99</sup>. Moreover, while appreciating the importance of international criminal justice cooperation institutions in a criminal trial dimension, and respectful of the fundamental prerogatives of the person involved, doctrine also holds that “the decision on the admissibility (...) [of cooperation] cannot be compared *tout court* to one on the ascertainment of criminal liability”<sup>100</sup>.

On the other hand, it is presupposed that a certain level of protection is shared (in the adoption of an act of judicial cooperation) so that EU principles may be safeguarded (these are absolute because they are part of the European constitutional system), such as the primacy and uniform application of its rules. For this reason the level of protection granted to a person involved in proceedings in which the principle of mutual recognition is operative may be lower than (as long as it conventionally complies with) what each national system is obliged to apply if it were a case not of judicial cooperation but the exercise of punitive power<sup>101</sup>.

In this way, the principles concerning fundamental rights recognized by the courts of Luxembourg and Strasbourg can be continuously transferred to domestic legislations, guaranteeing the inviolability of shared principles and values, thanks to the virtuous circle determined between these and domestic courts<sup>102</sup>. It is a phenomenon that does not have only one predetermined vertical direction (“top down”) but also go in the opposite direction (since values common to Member States can strengthen EU principles), and also horizontally (between the European Courts, and between national courts, reciprocally). It is a dynamic that is likely to boost the protection of human rights.

Moving on to the specific level of case law which deals with European measures acknowledging the principle of mutual recognition (therefore more relevant to the procedural issues that concern us here), the reconciliation of divergent in-

96 See above Judgement, paragraph 86 (italics added)

97 As those protected by Articles. 2, 3, 4, paragraphs 1, and 7 of the Convention on Human Rights: on this issue, also in relation to the last-mentioned judgment, see N. Parisi, *Estradizione e diritti dell'uomo fra diritto internazionale generale e convenzionale*, Milan, 1983.

98 The excerpts are from the ECJ judgement in Case *Melloni*, cit. (above, note 22), paragraph 62.

99 Judgement. cit., paragraph 53.

100 Thus E. Marzaduri, *Libertà personale e garanzie giurisdizionali nel procedimento di estradizione passiva*, Milan, 1993, pp. 184-190 (p. 188 for the quotation).

101 The same conclusions were reached, albeit in different ways, by G. De Amicis, *All'incrocio tra diritti fondamentali*, cit.

102 On the circulation of values of a constitutional scope, see the significant article by Zagrebelski G, *Costituzione Quei principi sempre più globali*, in *Corsera*, April 21, 2006, p. 1 and 44-45; on the privileged role played to this end by the dialogue between national constitutional courts and the European Courts, see among the many contributions, L. Eisen, *L'interaction des jurisprudences constitutionnelles nationales et la jurisprudence de la Cour européenne des droits de l'homme*, in D. Rousseau, F. Sudre (cur.), *Conseil constitutionnel et Cour européenne des droits de l'homme*, Paris, 1990, p. 137 ff.; G. Cohen-Jonathan, *La Convention européenne des droits de l'homme et les systèmes nationaux des Etats contractants*, in *Mél. Valicos*, Brussels, 1998, p. 385 ff.; A. Tizzano, *La Corte di giustizia delle Comunità europee e i diritti nazionali* (resoconto dell'intervento), in *Dir. Un. eur.*, 2005, p. 839 ff.

terpretations (and consequent applications) of the rules contained, for example, in the Framework Decision on the European arrest warrant and in the national provisions applying it<sup>103</sup>, has led, in addition to the nomophylactic rulings of the Court of Cassation<sup>104</sup>, to a large amount of case law by the Constitutional Court and trial courts, the latter referring the issue to the Court of Justice for a preliminary ruling. This has brought about a fine-tuning and a more physiological operation (as regards the rights of the person) of the principle of mutual recognition in the application of the Framework Decision.

Briefly considering the cases that are deemed most relevant point by point<sup>105</sup>, we have: strict judicial scrutiny of the rule on double criminality<sup>106</sup> (Article 2 Framework decision) to see if it complies with the principles of equality and non-discrimination, and ultimately to the principle of legality of criminal law<sup>107</sup>; control tasks, specifically in relation to the respect of fundamental rights<sup>108</sup>, to be exercised by the judicial authority implementing the warrant; compliance with the *ne bis in idem* principle<sup>109</sup>; the non-discrimination of a resident or residing citizen (as opposed to a EU citizen) to improve chances of social rehabilitation when serving a sentence involving restrictions on liberty of movement<sup>110</sup>; the principle of speciality<sup>111</sup>.

103 In the Italian system, case law on the execution of judicial decisions based on the principle of mutual recognition does not differ from that on the European arrest warrant: in fact, Framework Decision 2002/584/JHA Council of 13 June 2002, cit., was complied with on April 22, 2005, (no. 69); as regards Council Framework Decision 2008/909/JHA of 27 November 2008 on the 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 ( OJEU L 327, Dec. 5, 2008, p. 27 ff., Italy complied with unusual speed in Legislative Decree no. 7 September 2010, no. 161, therefore before the obligation for compliance had expired on 5 December 2011, according to Article. 9, para. 1).

104 Cassation, Sezz. un. n. 4614/2007, cit.

105 On the importance of the issues that the principle of mutual recognition raises as regards the surrender of the person, see G. De Amicis, G. Iuzzolino, *Guida al mandato d'arresto europeo*, Milan, 2008; E. Zanetti, *Il mandato d'arresto europeo e la giurisprudenza italiana*, Milan, 2009; as regards foreign case law, see M. Fichera, *The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?*, in *European Law Journal*, 2009, specifically p.89 ff.

On the function of European and national (Italian) case law to resolve the contradictions between the Framework Decision on the European arrest warrant and the Italian law transposing it, see L. Daniele, *Il dialogo tra Corte di giustizia e Corti supreme degli Stati membri: il caso del mandato di arresto europeo*, in *Studi sull'integrazione europea*, 2011, p. 433 ff.; G. De Amicis, *Primi orientamenti della Corte di Giustizia sul mandato d'arresto europeo: verso una nomofylachia "europeanitaria"?*, in *Dir. pen. proc.*, 2011, p. 1021 ff.

106 Article 2 framework decision cit.

107 Judgment of the Court of Justice of May 3, 2007, Case C-303/05, *Advocaten voor de Wereld*, paragraph 44 ff.

108 In relation to the judgments of proceedings held in absentia, see: the already mentioned judgment of the Court of Justice in the *Melloni* case, paragraph 35 ff., in addition to the judgement of the Court of 21 October 2010, case C-306/09, *IB*, p. to 48 ff.; in relation to the right to effective judicial protection, the presumption of innocence and respect for the rights of the defence, see judgment of the Court of Justice of 29 January 2013, Case C-396/11, *Radu*, paragraph 28 ff., in relation to the duration of custody, see judgement of the Court of Cassation, Sezz. un. n. 4614/2007, cit., paragraph 7 ff.

109 Judgments of the Court of Justice November 16, 2010, Case C-261/09, *Mantello*, paragraph 32 ff.; 17 July 2008 in Case C-66/88, *Kozłowski*, paragraph 30 ff., 6 October 2009 in Case C-123/08, *Wolzenburg*, paragraph 48 ff. 5 September 2010, Case C-42/11, *Lopes Da Silva Jorge*, paragraph 27 ff.

110 Judgments of the Court of Justice of 6 October 2009, *Wolzenburg*, cit.F; 17 July 2008, *Kozłowski*, cit., paragraph 45, 6 October 2009, *Wolzenburg*, cit., p. to 62; October 21, 2010, *IB*, cit. paragraph 52; 5 September 2010, *Lopes Da Silva Jorge*, cit., p. to 32, the Constitutional Court. (It.) of 24 June 2010, no. 227, paragraph 1 ff.

111 Judgments CG 1 December 2008 in Case C-388/08 PPU *Leymann and Pustovarov*, p. to 41 ff.; and May 30, 2013, Case C-168/13 PPU, *F*, p. to 33 ff.



## THE AREA OF FREEDOM, SECURITY AND JUSTICE AS A “PLACE” OF THE PERSON AND NOT AS A MERE CONTAINER FOR JUDICIAL COOPERATION BETWEEN MEMBER STATES: THE FUNCTION OF THE EUROPEAN PUBLIC PROSECUTOR’S OFFICE IN THIS DIMENSION

The first phase of criminal law cooperation within the European Union resulted from the realisation that the free movement of goods, people and capital needed to be balanced by the repression of crime. It was certainly the security issue that determined the first framework decisions based on the principle of mutual recognition of judgments in criminal matters. However, they did not ignore the sphere of civil guarantees, which over time has been fine-tuned, thanks to the contribution of European legislation as well as domestic, international and European case law. The entry into force of the Lisbon Treaty - with its well-known institutional provisions<sup>112</sup> - is certainly responsible for giving more substance to guarantees, placing the individual at the centre of the area of freedom, security and justice.

We must, however, consider that this result envisages a strong element of discontinuity with what happened in the internal market. The principle of mutual recognition in criminal matters was born with a dual personality. The first is the perspective of Member States after the entry into force of the Treaty of Amsterdam, still evident in Article 82 of the Treaty on the Functioning of the European Union (2007, based on an approach used in the 2004 “Constitutional Treaty”), which acknowledges mutual recognition primarily as a mode of cooperation between national authorities belonging to different spheres of government. In short, the approach holds that the European area of criminal justice is a container for judicial cooperation between Member states. It is a perspective in which each Member State asserts its own criminal legal system even in cases of cross-border criminal conduct of EU significance. Consequently it involves a distribution of jurisdiction among sovereign states and not among authorities belonging to the same legal area. From the first personality derives the second – the activity of harmonization of legislative guarantees for persons (defendants, suspects, convicts, victims) involved in inter-state proceedings. Article 82, par. 2, clause 2, TFEU (as well as the beginning of Chapter 4 of Title V devoted to the Area of Freedom, Security and Justice) is clear: the activity of legislative harmonization of criminal trial guarantees can proceed “to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension”<sup>113</sup>.

Conversely, as originally recognized in the legal system of the European Communities, mutual recognition was a principle mainly serving people living in the European economic area. In this container, it is the people, not government authorities, who take centre stage. This dimension of mutual recognition (and *confiance mutuelle*) is the one that should also be recognized in the European criminal law sphere, a dimension that goes beyond cooperation between authorities and concerns the relations between persons and the Union. It means that European

112 See, in the extensive doctrine, D. Rinoldi, *Lo spazio* (2012), cit., cap. I.

113 Idem Article 67, para. 3 TFEU.

legislation combating crime through the principle of mutual recognition is acceptable in light of the principles of the rule of law if it is primarily directed at strengthening civil guarantees, so that European citizens (and, more broadly, every person involved in criminal proceedings) can place their trust in the EU system<sup>114</sup>.

This change in the regulatory approach formally adopted by the Treaty of Lisbon emerges especially in the as yet few judgements that emphasize the need for people, not just states and their authorities, to have trust in the administration of justice<sup>115</sup>. More significantly, the Stockholm Programme<sup>116</sup> emphasises not the cooperation between national authorities but the need to develop an area “responding to a central concern of the peoples of the States brought together in the Union”<sup>117</sup>, a Union “built on fundamental rights”<sup>118</sup>, that “respects diversity and protects the most vulnerable”<sup>119</sup>, in which “access to justice must be made easier”<sup>120</sup>. The whole of part three of the Program – entitled the principle of mutual recognition – highlights the rights of the person (which also means guaranteeing “protection from trans-national threats”<sup>121</sup> and from natural and man-made disasters<sup>122</sup>) and not the relations between national authorities pursuant to this principle. It might be objected that the Stockholm Programme belongs to the realm of *soft law*, which will eventually give way to the “hard” rules of treaties. Instead, I believe that we can assert - in accordance with the provisions of Article 31 of the Vienna Convention on the Law of Treaties - that treaty rules must be interpreted in the light of any subsequent practice in the application of the provisions. In the case that concerns us, this practice (starting in 2009) gives much more weight to the personal principle within the European penal area than this principle did in 2004, when the rules of the Treaty of Union were written. Surely, then, the standpoint to be adopted (also during the Italian Presidency of the European Union) is the one where the needs of security (which must be taken into account, since it is not by chance that the aim is also to pursue a “European area of security”) must be based on a high level of guarantees for the person.

In my opinion, it is this clear framework for the EU Area of Freedom, Security and Justice that gives rise to the difficulties of making the area operational as a laboratory of interstate cooperation. They arise from the fear expressed by national authorities of giving full effect to the principle of mutual recognition<sup>123</sup>, masked by

114 *Idem*, the Stockholm Programme, cit. (above, note 23), paragraphs 2 and 1.1

115 See above, in the text at note 22 (as well as note 24, the Opinion of the Advocate General in a different trial).

116 See also Communications of the Commission (adopted on June 10, 2009, thus before the Stockholm Programme) on *An area of freedom, security and justice serving the citizen*, COM (2009) 262 final, and *Justice, Freedom and Security in Europe since 2005: An evaluation of the program and of the Hague Action Plan*, COM (2009) 263 final.

117 The program opens with this expression: paragraph 1.

118 P.to 2.1 programme cit.

119 Rubrica p.to 2.3 Programme cit.

120 P.to 3.4.1 Programme cit.

121 P.to 4.1. programme cit.

122 P.to 4.6 Programme cit.

123 In fact, it will be used to carry out final judgments of a court of another Member State, of decisions made prior to the judgment, and of decisions taken in the context of post-sentencing follow-up decisions. In fact, looking at it in more detail, the principle of mutual recognition has been adopted in framework decisions relating to foreign criminal decisions regarding the person: surrender (2002/584/JHA), the application of provisional detention (2009/829/JHC), the supervision of probation measures (2008/947/JHA), the transfer of the person for the purposes of proceedings or enforcement action (2002/584/JHA), the “*prise en compte*” of final decisions in criminal matters pronounced by a court of a Member State (2008/675/JHA) and the exchange of information from criminal records (2009/315/JHA); fi-

the need to grant better protection to individual prerogatives, and thus yielding to the temptation to place a limit on it for reasons of public order<sup>124</sup>. On closer inspection, this contention is most often supported by the desire to safeguard national sovereign prerogatives. What is missing, on the contrary, in the discipline of positive law is a clear intervention (as the Court of Justice recently did with the judgment delivered in the *Melloni* case) to make the enforcement of the judgment of another Member State less optional. As evidence of this, consider the emblematic *Krombach* case. The case, which was resolved unsatisfactorily in court and at the level of cooperation among authorities of EU Member States, shows that the principle of mutual recognition (which came to the fore with regard to a domestic judgment in civil matters relating to compensation for damage, but originally involving a case of criminal relevance) still leaves Member States too much leeway. The way this principle is articulated allowed the Member States, despite their insistence for a single area of justice, to evade their obligations in the administration of justice. On the one hand, France continues to allow a European citizen - who commissioned the kidnapping of another European citizen - not to be brought to justice in another country (Germany), while itself issuing a light sentence; on the other, Germany has opposed the circulation of the civil judgment - although this goes against one of the cardinal principles of Brussels Convention on jurisdiction, recognition and enforcement of judgments in civil and commercial matters - for reasons of public order, because of the differences between the two domestic procedural systems as regards trials in absentia<sup>125</sup>. In short, so far the judicial solution has undermined the two assumptions on which the use of mutual recognition is based within the Area of Freedom, Security and Justice: when recourse to foreign public law produces different results from those of the domestic court<sup>126</sup>; when the guarantees recognised in the two national legal systems are different, since "in the context of European judicial cooperation, it would be arbitrary to make each

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financial penalties (2005/214 / JHA, as amended by Framework Decision 2009/299/JHA), freezing property or evidence (2003/577/JHA), seizure (2006/783/JHA) also of products connected to the crime (2005/212/JHA), financial penalties (2005/214/JHA), obtaining evidence (2008/978/JHA). For a brief commentary on each of these Framework Decisions (accompanied by relevant case law, if any) see A. Damato, P. De Pasquale, N. Parisi, *Argomenti di diritto penale europeo*, Turin, 2013, II ed.

124 There has been talk, in this regard and for the Italian legal system, of the risk of a "proliferation of incidental questions of constitutionality, and the violation of "counter-limits" (...) not only directly against the provisions of the Italian Constitution, but also in virtue of the reference made to national constitutions by Article 53 of the Charter" (thus E. Gianfrancesco, *Incroci pericolosi: Cedu, Carta dei diritti fondamentali e Costituzione italiana tra Corte costituzionale, Corte di giustizia e Corte di Strasburgo*, in [www.rivistaaic.it](http://www.rivistaaic.it), p. 11). The judgment of the Court of Justice in the *Melloni* case, points to a similar tendency in the Spanish system.

125 This outcome results from the reference for a preliminary ruling to the ECJ and resolved by judgment of 28 March 2000 in Case C-7/98, *Krombach*, paragraphs 44-45, according to which "44. (...) recourse to the public-policy clause must be regarded as being possible in exceptional cases where the guarantees laid down in the legislation of the State of origin and in the Convention itself have been insufficient to protect the defendant from a manifest breach of his right to defend himself before the court of origin, as recognised by the ECHR. Consequently, Article II of the Protocol cannot be construed as precluding the court of the State in which enforcement is sought from being entitled to take account, in relation to public policy, as referred to in Article 27, point 1, of the Convention, of the fact that, in an action for damages based on an offence, the court of the State of origin refused to hear the defence of the accused person, who was being prosecuted for an intentional offence, solely on the ground that that person was not present at the hearing. 45. The answer to the second question must therefore be that the court of the State in which enforcement is sought can, with respect to a defendant domiciled in that State and prosecuted for an intentional offence, take account, in relation to the public-policy clause in Article 27, point 1, of the Convention, of the fact that the court of the State of origin refused to allow that person to have his defence presented unless he appeared in person."

126 See the afore-mentioned judgment of the Court of Justice in the *Bourquain* case, paragraphs 36-37.

and every domestic constitutional provision a parameter for the legality of a request" to execute a sentence<sup>127</sup>.

In conclusion, and leaving aside other goals underlying the initiative to establish the European Public Prosecutor's Office<sup>128</sup>, we have highlighted that the Office fits in fully with the truly personal dimension that is taking shape in the European Area of Freedom, Security and Justice. First and foremost, in fact, the Office cannot be ascribed to the category of tools used for the judicial cooperation of Member States, if only because it will relieve national criminal jurisdictions of the exercise of certain amount of sovereign power - the power of investigation, start of criminal proceedings and prosecution of crimes affecting the Union's financial interests<sup>129</sup> (its competence being limited to this sphere of action for the time being), which can be delocalized to one or more offices under its administration, according to the criterion of greater competence.

Conversely, the Office will aim to ensure greater effectiveness in prosecutions, placing cases under the authority of the court best fitted to administer the proceedings, for the benefit of the people (not just the EU, which will be able to protect financial resources from fraudulent conduct<sup>130</sup>) who inhabit the Area of Freedom, Security and Justice. By giving the Office the responsibility for deciding which authority is competent to handle a case, the risk of *forum shopping* will be reduced (ie the search for a court where there is less risk of punishment and effective implementation of the resulting sanctions), also eradicating the risk of discriminatory treatment due to the differences in the legal systems from one Member State to another. In short, the European Public Prosecutor's Office will be able to remedy the present heterogeneity among domestic legislations in the field of prosecution and punishment<sup>131</sup>. The proposed regulation will be able to overcome the little (and yet virtuous) harmonization implemented with the so-called PIF Con-

127 Court of Cassation (It.), Sezz. un., n. 4614/2007, cit.; in accordance with the judgment of the Court of Justice in the *Melloni* case, cit.

128 The proposed regulation cited above summarizes these objectives in paragraph 3.3: "To contribute to the strengthening of the protection of the Union's financial interests and further development of an area of justice, and to enhance the trust of EU businesses and citizens in the Union's institutions, while respecting all fundamental rights enshrined in the Charter of Fundamental Rights of the European Union; to establish a coherent European system for the investigation and prosecution of offences affecting the Union's financial interests; to ensure a more efficient and effective investigation and prosecution of offences affecting the EU's financial interests; to increase the number of prosecutions, leading to more convictions and recovery of fraudulently obtained Union funds; to ensure close cooperation and effective information exchange between the European and national competent authorities; to enhance deterrence of committing offences affecting the Union's financial interests."

129 The notions of the financial interests of the Union and of civil servants as well as the qualifications of the criminal conduct committed by the latter to the detriment of the first (for which see the note below) are defined by the draft directive presented by the European Commission to replace the regulation set by the 1995 Convention on the protection of the European Communities' financial interests contained in the *Report from the Commission accompanying the proposal for a directive of the European Parliament and of the Council on the fight against fraud affecting the financial interests of the Union by criminal law*, COM (2012) 363 final of 11 July 2010, pp. 16-18 for the text of Articles 2-5.

130 According to the reference made in Article 2, letter b, of the proposed regulation to the rules established by the relevant directive (referred to in the previous footnote), namely: fraud in the strict sense (Article 3), related crimes (art. 4 "disclosure or failure to disclose information to entities or authorities responsible for the award of a public contract or award a grant that would affect the financial interests of the Union, due to candidates or tenderers, or agents, or persons otherwise involved in preparing responses to tenders or participants' requests for grants, when such act or omission is intentional and is intended to circumvent or distort the application of the criteria for eligibility, exclusion, selection and award" money laundering; bribery and corruption; wrongful retention; instigating, aiding, abetting and attempt (Article 5).

131 Aspects related to the poor capacity for harmonization of the PIF Convention are well summarized in the above-mentioned *Report*. Above, note 127, p. 3.

vention of 1995<sup>132</sup>, in subjective terms (as concerns the categories of persons liable for prosecution) and objectively (as regards criminal behaviour and, consequently, the quality and type of punishment to which they would be subject). And the very existence of the Office<sup>133</sup> will strengthen the right to effective remedy.

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132 Convention of 26 July 1995 *on the protection of the financial interests of the European Communities (PIF)*, for which see D. Rinoldi, *Lo spazio* (2012), cit., chap. V, para. 5.1.

133 The decisive contribution to this goal was provided by a different organization for appeals to the ECJ, established principally in Article 263 TFEU, which states that the Court of Justice of the European Union shall review the legality of all acts (including those that are not binding) of EU institutions, authorities and offices, so that an appeal lodged by an individual against an act of a European body (in the case of OLAF) should no longer be refused: see CG order of 19 April 2005 in Case C-521/04 P/R, *Tillack*.



V session



The implication of the establishment of the EPPO in Italy: paving the way for the Italian Presidency of the UE





# The consequences of the establishment of the European Public Prosecutor's Office on the Italian legal system and the Italian Presidency of the EU

*Check against delivery*

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*Before focusing on the consequences of the establishment of the European Public Prosecutor's Office on the Italian legal system (and each of the fundamental principles of the Italian constitutional system), the author looks at some of the institutional aspects that will characterize the period Italian Presidency of the EU. Then, the author looks at what has been achieved in the field of criminal law during the four years of the Stockholm Program, focusing on the opportunities Italy will have during its Presidency to set the priorities for the next five-year program (2015-2019).*

Taking into account what has so far been said during the two days of work, I will briefly touch on points that I think deserve to be underlined.

First, let me emphasize that the future Italian Presidency of the EU, which, as we know, will come into effect in the second half of 2014, will be marked by a series of events. I am referring primarily to the fact that in 2014 there will be the elections for the new European Parliament, and the results of the elections in individual countries (I am thinking in particular of Italy, France and Germany) will certainly affect political balances and thus the topics to be discussed.

The European Commission's mandate, too, will expire on October 31, 2014, during the Italian Presidency. As for the make-up of the Commission, it is important to take into account the fact that, as of July this year (in less than a month's time), the Union will be made up 28 Member States. Croatia will become the 28th EU Member State, despite the European Commission's report urging Croatia to do more to fight corruption and human trafficking. As regards the composition of the Commission, it is necessary to keep in mind that Article 17 TEU states that if the Commission is appointed by October 31, 2014, it will consist of one national of each Member State, thus 28 in all, otherwise if it is appointed after November 1, it will consist of a number of members corresponding to two thirds of the number of Member States, unless the European Council, acting unanimously, decides to alter this number. So how many members of the Commission will we have? The answer was given in a recent press release, not even publicised on the EU website, which announced that, on May 22, 2013, the European Council adopted a decision, applicable from 1 November 2014, according to which the Commission will continue to be composed of one Commissioner from each Member State,

therefore, 28 commissioners. The situation could change, it says, when the Union is made up of 30 Member States. It is no coincidence that the decision of the European Council was reached almost at the end of the Irish Presidency of the EU, since it was precisely the concerns of the Irish people on this topic had led to a political agreement in the European Council during meetings in December 2008 and June 2009 on maintaining the current composition of the European Commission.

Finally, the five years of the Stockholm Program, 2010-2014, aimed at the development of an Area of Freedom, Security and Justice, will have come to an end shortly before the start of the Italian Presidency. In this regard, I shall briefly go over the political priorities contained therein, and make an initial assessment of what has been done in these four years.

According to the European Council, the priority for the 2010-2014 five-year period was to promote citizenship and the rights of citizens. The challenge was to ensure respect for human rights and fundamental freedoms and integrity of persons, whilst also guaranteeing security in Europe. Therefore, law enforcement action had to be accompanied by measures to protect the rights of individuals and the rule of law, and rules on international protection, in a logic of mutual benefit. In other words, the goal was to create an effective balance between the three components of the Area of Freedom, Security and Justice.

In fact, before the Lisbon Treaty, the ancillary position of fundamental rights within the EU's criminal judicial cooperation contrasted with the "constitutionalization" of the Charter of Fundamental Rights.

Therefore, by identifying the policy priorities for the 2010-2014 five-year period, the Stockholm Program seems to have recognized the need to adopt measures to harmonize procedural guarantees, seen as indispensable for the creation of a European Judicial Area that could not only form the basis for greater mutual trust between competent authorities but also reduce the differences in the treatment of offenders and give European citizens a common sense of justice, contributing to the development of a common identity.

The second priority was to establish mechanisms in the European legal system that facilitated access to justice. This priority included professional training and cooperation for legal practitioners.

Apart from the aspects of freedom and justice, there was also a call for security in Europe to protect the lives and safety of citizens and tackle organized crime, terrorism and other threats.

Naturally, the political priorities also included immigration and asylum, which, for obvious reasons, I shall not take into consideration.

Bearing this in mind, I shall refer, briefly, to what has been achieved to date in the implementation of the Stockholm Program with regard to criminal law. I shall take into account, on the one hand, the action plan for the implementation of the Stockholm Program, adopted by the European Commission in April 2011, and on the other, the mid-term evaluation made under the Cypriot Presidency of the EU (November 2012). However, I must point out that to date we still lack the formal mid-term report of the European Commission, a fact that was strongly criticized by the European Parliament and the Council.

The mention that I will make of the proposals and acts, albeit without analysing

them for reasons of time, aims not only to contribute to greater transparency but also to help us identify the starting points for the new five-year program.

I must first underline that criminal law has developed substantially since the entry into force of the Lisbon Treaty, thanks also to the new procedure applicable to this area. In particular, the European Parliament and the Council worked together to strengthen the fight against trafficking in human beings (Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, replacing Council Framework Decision 2002/629/JHA, April 5, 2011), the sexual exploitation of minors (Proposal for a Directive on combating the sexual abuse and sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA COM (2010) 0094, 29 March 2010), the protection of women and victims of crimes (2012/29/UE Directive establishing minimum standards on the rights, support and protection of victims of crime, replacing Council Framework Decision 2001/220 / JHA, October 25, 2012) and the recognition of procedural safeguards for the suspected or accused person (Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, 20 October 2010; Directive 2012/13/EU on the right to information in criminal proceedings, May 22, 2012; Proposal for a Directive on the right of access to a lawyer in criminal proceedings and the right to communicate upon arrest, COM (2011) 326, June 8, 2011; the European Commission 2013 calendar also includes initiatives on the presumption of innocence and the free legal aid).

I would also like to mention the decisions and communications of the European Commission on the fight against money laundering and corruption. Although they are not specifically aimed at protecting the financial interests of the Union, they contribute to the protection thereof. These are: the European Commission Report on cooperation between the offices of Member States for the recovery of assets in the field of tracing and identification of proceeds of crime or other related property, (COM (2011) 176, 12 April 2011); Communication of the European Commission on the fight against corruption in the EU (COM (2011) 308, 6 June 2011); Report of the Commission on combating corruption in the private sector (COM (2011) 309, 6 June 2011); European Commission Decision establishing an EU anti-corruption reporting mechanism for periodic assessment (COM (2011) 3673, June 7, 2011).

The administration of justice should not be slowed down by unjustifiable differences. New common areas should be established. I am referring to confiscation (see the proposal for a Directive on the freezing and confiscation of proceeds of crime in the European Union, COM (2012) 085, March 12, 2012). On this issue, the Commission has submitted a report concerning the application of the principle of mutual recognition for confiscation orders.

To develop an Area of Freedom, Security and Justice that can operate properly we need essential tools such as a new and comprehensive system for obtaining evidence in cross-border cases and a better exchange of information between the authorities of Member States.

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<sup>2</sup> Idem.

The report states that the European Parliament regrets the fact that, under current legislation, we are unable to link up the OLAF and Europol databases; it stresses the importance of closer cooperation and improving transparency by means of effective communication and exchange of information among law enforcement agencies of Member States, Europol, Eurojust, OLAF and ENISA, and the corresponding authorities of third countries, especially those neighbouring the EU. This would improve systems for the collection of evidence and ensure the effective processing and exchange of data and information to help the investigation of crimes, including those affecting the financial interests of the EU, in full respect of the principles of subsidiarity and proportionality, as well as the Fundamental Rights of the European Union. The European Parliament then invited the Commission to work on a roadmap for closer judicial and police cooperation, and to establish a criminal investigation authority and internal intelligence agency to carry out investigations on violations and crimes committed in the EU. It invited all Member States to make a commitment to exploit the full potential of Europol and Eurojust, whose work and success, irrespective of the ongoing reforms and necessary improvements to be made, are strictly dependent on the levels of participation, trust and collaboration of national investigative and judicial authorities. It invited Member States and the Commission to continue their joint efforts to finalize the negotiations for the draft directive on the European criminal investigation system, simplifying the collection of evidence in cross-border cases. This would represent a step forward on the road towards a single Area of Freedom, Security and Justice. The report calls for greater cooperation in the field of document counterfeiting and fraud, and joint reflection to improve the reliability and authentication of original documents. It stresses the need to strengthen cooperation on fraud against the EU in Union services at all state levels, including regional and municipal levels, given the fundamental role they play in the management of EU funds. It believes it is essential to step up the fight against tax fraud and tax evasion to promote sustainable growth in the EU and insists on the creation of a European Public Prosecutor's Office (EPPO), implementing Article 86 of the TFEU, in order to combat crimes affecting the financial interests of the Union and serious offences of a cross-border nature. In this respect, it recommends that the future European Public Prosecutor's Office be flexible and streamlined, coordinating and pressing national authorities to ensure greater coherence in investigations through uniform rules of procedure. It considers it essential that the Commission submit a proposal before September 2013, which clearly defines the structure of the European Public Prosecutor's Office, its accountability to Parliament and, in particular, its interaction with the Europol, Eurojust, OLAF and the EU Agency for Fundamental Rights, placing it in a clear context of procedural rights and specifying the offences it will be dealing with. It believes Eurojust could continue to deal with crimes set out in Article 83, paragraph 1, TFEU, and also, if need be, crimes of a complementary nature, as required by paragraph 2 of the same article, continuing to ensure accountability in the field of democratic and fundamental rights in its upcoming review. It urges Member States to allocate additional resources to Europol, Eurojust, Frontex and the future European Public Prosecutor's Office (EPPO), since success would cre-

ate a multiplier effect on the reduction of Member States' loss of revenue, to complete the roadmap for the rights of persons suspected and accused of crimes, and to draw up a directive on pre-trial detention.

As Luigi Berlinguer said during this conference, Member States should, without delay, transpose all existing European and international legal instruments into their national legal systems.

I shall now briefly mention the provisions of the Stockholm Program and what has been implemented to date because, during its EU Presidency, Italy will have the opportunity to set the priorities to be pursued not only in its six-month Presidency but also for the new five-year program, from 2015 to 2019. It is too early to identify the issues but we shall certainly have to face up to the consequences arising from the establishment of a European Public Prosecutor's Office.

In reference to the latter, we know that the presentation of the European Commission's proposal was put back, from June to July. The discussions in the Council will probably take place under the Lithuanian or even the Greek Presidency of the EU. It will be rather difficult to achieve unanimity. Discussions will, therefore, begin with the European Council, which, at the request of at least nine Member States, and only if there is consensus, will, within four months, refer the project to the Council for approval. In case of disagreement, the nine Member States concerned could decide to establish enhanced cooperation, informing the European Parliament, Council and Commission. Authorization would be considered as granted.

In order to proceed with enhanced cooperation, the Member States concerned will want to have as precise a picture as possible. All this, however, is likely to cause further delays. It is possible, therefore, that under the Italian Presidency everything will still be undecided. It all depends on what happens under the Lithuanian and Greek Presidencies, and it is as yet too early to say. Italy may well, however, keep to its position and support the establishment of a European Public Prosecutor's Office.

This last consideration, leads to a final reflection, centred on the question of compliance, in the case of the establishment of a European Public Prosecutor's Office, with the principles of our Constitution. It is known, in fact, that "the criminal justice system has the greatest effect on the sphere of personal freedom, thus it is subject to limitations and safeguards" (see Grasso). The creation of a European trial system must, therefore, comply the guiding principles of our constitutional system. I refer in particular to:

- 1) Judge pre/established by law (Article 25 I and II, It. Const.)
- 2) Fair trial, equal status for parties in a trial, right to examine, right to examine in the formation evidence, the principle of independence and impartiality (Article 111, It. Const.)
- 3) Presumption of innocence (Article 27, It. Const.)
- 4) Mandatory prosecution (Article 112, It. Const.)

These aspects will be the subject of detailed analysis by the speakers who will follow me. For this reason, I shall briefly present and comment on them.

Beginning with the principle of mandatory prosecution, it should be remembered that it has been considered a fundamental principle in many of judgements

of the Constitutional Court. If the future European Commission's proposal were to reflect the indications contained in the 2000 *Corpus Juris* and in the Green Paper, providing for mandatory prosecution, even if slightly tempered (with the European Prosecutor referring minor crimes to national authorities or deciding to close the case if the suspect acknowledges his or her guilt and makes amends), it would not be in conflict with our Constitution. Otherwise, it may infringe not only the principle of mandatory prosecution but also the constitutional principles related to it, such as the principle of legality and the principle of equality. In its Resolution of 27 March, 2003, the European Parliament stated that the provision of mandatory prosecution is indispensable. However, it should be pointed out that, according to doctrine (Allegrezza), exemption from mandatory prosecution may be considered compatible with our Constitution if the individual parameters are defined clearly enough in advance.

In turn, the Strasbourg Court considers the principles of independence and impartiality (prior to the new Article 111 of the Italian Constitution, the latter was not explicitly provided for in Italy, even though it was implied by other Constitutional provisions) to be the building blocks of any fair trial. The European Court pointed out that the independence of a judge is not diminished, in relation to other powers, by the fact that he or she has been appointed by the executive.

Taking into account these considerations, the content of the Commission's proposal regarding the appointment of the European Prosecutor still remain unclear, since different procedures are envisaged in the *Corpus Juris* and in the Green Paper.

The equal status of the parties in a trial involves having guarantees for the defence. As I said at the beginning of my speech, the roadmap established by the Council on procedural guarantees is being implemented (the directives on the right to interpretation and translation and the right to information in criminal proceedings have already been adopted, while approval is underway for the right of access to a lawyer in criminal proceedings and the right to communicate upon arrest). The provisions contained in them meet the needs of guarantee envisaged in our Constitution, although as yet there is no rule that upholds the principle of presumption of innocence. This principle must, in any case, be respected since it is enshrined in Article 49 of the Charter of Fundamental Rights.

There is no doubt that proceedings before the European Public Prosecutor should be accompanied by adequate guarantees for the accused. I also think the counsel for the defence should receive adequate training.

As regards the principle of natural judge, pursuant to Article 25 of the Italian Constitution, the *Corpus Juris* and the Green Paper raised concerns about the criteria to be used by the European Public Prosecutor's Office in identifying the competent national court.

Finally, with regard to the principle of legality in the formal sense, and of the necessary democratic link between the people of the EU and the authorities exercising judicial power, I would draw your attention to what is stipulated in Article 49 of the Charter of Fundamental Rights: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed". Interaction between the *civil* and *common law* systems is the

natural justification for this wording, which are based on a “broadened” concept of legality (see *De Amicis*). On the other hand, as acutely pointed out in doctrine, “in European legislation there is a degree of caution and awareness of the constitutional limits imposed on Member States by their respective legal systems. (...) What is worrying is rather the slow, incomplete lack of implementation of legislative acts adopted by the institutions”(see *Parisi*). It is true, however, that after the Lisbon Treaty, these behaviours may be subject to infringement proceedings before the Court of Justice. Furthermore, as opposed to Article 7 ECHR, the Charter enshrines the right to the retroactive application of the most favourable criminal law.

In summary, by making the Charter legally binding and giving the European Parliament a role of co-legislator in the field of judicial cooperation in criminal matters, our Constitutional principle of the saving clause in criminal matters would seem to be safeguarded. However, I am aware that the provision regarding the establishment of a European Public Prosecutor’s Office has been submitted through a less democratic process, a special and not an ordinary procedure.

To conclude my speech, I would like to quote Professor Delmas-Marty, “the great lesson of the European Court is to have shown that all national procedures have their weaknesses. No procedural system (accusers, inquisitorial, mixed) escapes its censure. However, at the same time, it has shown that, on the basis of the ECHR, harmonization in proceedings is perfectly possible. The set of principles deriving from the case law of the Strasbourg Court seem to outline a model for everyone”. These considerations also apply to the European Union, which not only has a legally binding Charter of Fundamental Rights that outline a framework of basic principles for the European criminal justice system, but is also finalizing its negotiations for accession to the ECHR.

# The establishment of a European Public Prosecutor's Office. The commitment of lawyers for professional training that ensures effective and competent defence

*Check against delivery*

**Vincenzo Comi**

*Lawyer, Expert in Criminal Procedure*

*While expressing misgivings and doubts about the European Commission's decision to establish a European Public Prosecutor's Office (EPPO) as a way of combating EU fraud more effectively, the author stresses the importance of involving bar associations in the difficult task of drafting the operational rules for the office. The author then indicates the minimum and inalienable guarantees to which suspects should have a right.*

## INTRODUCTION

The protection of fundamental and procedural rights in OLAF's investigative experience and from the perspective of the establishment of the European Public Prosecutor's Office is an issue that is of particular importance for the profession and role of the lawyer.

The Fondazione Lelio e Lisli Basso – ISSOCO, expertly chaired by Elena Paciotti, focuses again on fundamental rights in the field of European Justice and should be thanked for having organized a major initiative attended by authoritative exponents of the academic and judicial world; the quality of their contributions will leave its mark. The Scuola Superiore dell'Avvocatura, at the instigation of the Vice President Alarico Mariani Marini, several years ago signed a cooperation protocol with the Basso foundation for the organization of cultural and educational initiatives, especially in the field of fundamental rights and the training of European lawyers, and on this occasion it has joined and supported the initiative, disseminating the program to lawyers.

The School has placed at the heart of the training courses organized for lawyers the study and analysis of human and fundamental rights, which are now particularly relevant after the entry into force of the Treaty of Lisbon. These rights represent the juridical translation of the values of human dignity and offer a new prospect for young people entering our profession, and who represent its future.

Fundamental rights create new duties for lawyers towards society, affecting their role and giving our profession a new identity – the protection of rights and not merely the provision of services. The new duties will affect the relationship between lawyer and society, now lost, and constitute the foundation of modern and



secular professional ethics, from which new rules of conduct must be established, anchored to duties and responsibilities towards the State and all other powers, as stated in the Preamble to the Code of Conduct for European lawyers.

In the various study groups active in the school, one has for some time been working on human and fundamental rights. It consists of lawyers, judges and university professors who have overseen, among other things, the publication of several books, including the Code of rights, a collection of all the most important supranational regulations, which has been distributed free of charge to all practicing lawyers enrolled in law schools (about 15,000). Recently all those enrolled in the law schools of the Order of lawyers have been issued with a copy of the last volume, entitled “Historical charters of rights, a collection of charters, Declarations and Constitutions with explanatory notes”,

The School’s message for young people is clear: human rights will not be discussed in their philosophical or humanitarian aspects but in terms of legislation and case law. Study will focus on new sources of law to be applied in the everyday practice of our profession. The study of human rights basically means having a text of supranational legislation on our desk, to be constantly consulted, together with the case law of the European Courts. Already more than 200 practicing lawyers enrolled in law schools have participated in visits to European institutions, which the School has organised in the last two years. An initiative that has enabled young people to attend the hearings of the European Court of Human Rights in Strasbourg and the EU Court in Luxembourg. The next visit is scheduled for autumn 2013 at the International Criminal Court.

## THE PROTECTION OF THE ECONOMIC INTERESTS OF THE UNION AND THE PATH TOWARDS THE ESTABLISHMENT OF THE EUROPEAN PUBLIC PROSECUTOR’S OFFICE

The protection of the financial interests of the Union is the main objective of the establishment of the European Public Prosecutor’s Office (hereinafter also referred to as the EPPD)<sup>1</sup>.

The European Commission’s regulation proposal is imminent, after which a legislative process will quickly begin, and finally it will be discussed for approval by the European Council and Parliament.

In implementation of the Stockholm Programme and on the basis of Article 86 of the Treaty on the Functioning of the European Union (TFEU)<sup>2</sup>, the European

1 G. TESAURO, *Diritto dell’Unione Europea*, VII ed., Padua, 2012, for a discussion of the legal system of the European Union and the relationship of Community law with national law after the entry into force of the Lisbon Treaty in 2009. Various Authors, *L’istituzione del procuratore europeo e la tutela penale degli interessi finanziari dell’UE*, report on the conference held in Milan on 25 January 2013, in *Diritto Penale Contemporaneo* ([www.penalcontemporaneo.it](http://www.penalcontemporaneo.it)), 4 February 2013.

2 F. VIGANO’, *Fonti europee e ordinamento italiano*, in Viganò e Mazza, *Europa e Giustizia penale, Gli speciali di diritto penale e processo*, 2011, 4; P. SCARLATTI, *Codice essenziale di diritto costituzionale dell’Unione Europea, Il trattato sul funzionamento dell’Unione Europea*, pg. 63 et seq., Rome, 2011. Then Article 86 TFEU: 1. *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. The Council shall act unanimously after obtaining the consent of the European Parliament. 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 this 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*

Commission has been working for some time on the relevant regulations, which will contain elements of fundamental interest in terms of structure, organization, powers and competence. As stated in Article 86 of the TFEU, to combat crimes against the financial interests of the Union, the Council may establish a European Public Prosecutor's Office from Eurojust, approved unanimously by the Council after obtaining the consent of the European Parliament. The law also provides that should states disagree about the establishment of this office, enhanced cooperation will be strengthened and the relative provisions applied.

According to the provision, the European Public Prosecutor's Office, in liaison with Europol where appropriate, is responsible for investigating, prosecuting and bringing to judgment the perpetrators of crimes affecting the financial interests of the Union and prosecutes these crimes before the competent court authorities of Member States. The statute of the European Public Prosecutor's Office shall be defined with specific regulations, setting out the conditions for the exercise of its functions, the rules of procedure applicable to its activities, the admissibility of evidence and the rules applicable to the judicial review of procedural measures taken in the exercise of its functions<sup>3</sup>.

Fraud to the detriment of the European Union is a phenomenon that causes serious harm to the functioning and development of the eurozone. Over time the phenomenon has significantly worsened, despite the tools introduced over the years to fight it, mainly affecting areas such as agricultural policies or structural policies, weakening all European institutions and the political process of unification<sup>4</sup>.

Cooperation instruments between Member States do not go far enough to erad-

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*the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft regulation concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.*

2. *The European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests, as determined by the regulation provided for in paragraph 1. It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences.*
  3. *The regulations referred to in paragraph 1 shall determine the general rules applicable to the European Public Prosecutor's Office, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions.*
  4. *The European Council may, at the same time or subsequently, adopt a decision amending paragraph 1 in order to extend the powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension and amending accordingly paragraph 2 as regards the perpetrators of, and accomplices in, serious crimes affecting more than one Member State. The European Council shall act unanimously after obtaining the consent of the European Parliament and after consulting the Commission.*
- 3 Various Authors. Summary of the meeting held on April 9, 2013 of the European Observatory of the Joint Italian Criminal Chambers at the offices of the Department of Justice of the European Commission on the Regulation establishing the European Public Prosecutor's Office, p. 2; it emerged, from the hearings held at the offices of the European Commission Department of Justice, that the final decision was to submit a proposal, by the end of September 2013, for a regulation to begin the negotiations necessary for the final approval and start-up of the new office. Despite not knowing the contents of the draft regulation, the consultations with the institutions and associations were aimed to collect suggestions or helpful insights for the preparation of the final text, taking into account the sometimes divergent viewpoints of all stakeholders.
- 4 G. GRASSO, Harmonization and coordination of national penalties for the protection of the financial interests of the European Communities, in RIDPP, 1990 844. PALERMO- FABRIS, Recent Italian legislation in the field of Community fraud, in RTDPE, 1993 810. As shown verbatim in the annual reports of the EU Commission on the protection of the financial interests of the Union, figures for alleged fraud are very high (for example, in 2010 the figure was 600 million euros), but it is likely that the actual amount is even greater, since not cases are identified and reported. Comm. 2011 595 and related working documents of SEC Commission, 2011, 1107.

icate this serious malpractice. A significant problem is the diversity of legal proceedings in individual states, and of systems for acquisition and circulation of evidence, which has often made it difficult for anti-fraud measures to operate; there are also problems regarding communication, a stumbling block for state court proceedings against the perpetrators of the crimes<sup>5</sup>.

The creation of OLAF, the first EU anti-fraud office, has significantly modified the scenario. The new institution has a role that makes it a real driving force at the investigative level, needed after the entry into force of the Schengen Treaty, an agreement that facilitated the movement of goods and persons within the EU area. The office is autonomous and has the powers to gather information and conduct investigations of an administrative nature, which are then submitted to the authorities of Member States<sup>6</sup>. It is in this last phase of activity that we have the greatest difficulties in the operation of the current investigation system, due to the nature of investigative acts and the addressees of the reports in individual countries. In essence, information circulates with considerable difficulty among States, thus preventing cross-border communication and related evidence, thereby paralyzing the efficiency of investigations carried out by OLAF.

To date, judicial cooperation in the fight against Community fraud has used tools such as rogatory letters<sup>7</sup>, extradition<sup>8</sup>, European arrest warrant and mutual recognition of judicial decisions, in an effort to boost fight against cross-border crime.

The first convention on the protection of the financial interests of the European Communities and its protocols (PIF Convention) dates back to 1995 and has been ratified by almost all Member States. It introduced the first elements of criminal law to protect the financial interests of the EU<sup>9</sup>. The first hints of EU competence in criminal matters emerged in some of the decisions of the European Court of Justice, while criminal judicial cooperation was unequivocally established in the Maastricht Treaty with the provision of a specific sector of EU action called "third pillar".

In this regard, mention should be made of the proposal for a Directive of the European Parliament and of the Council in the fight against EU fraud by means of criminal law, dated 11 July 2011. The new legislative instrument aims to replace the first PIF convention, which has not had the desired effect in Member States.

5 There are frequent cases of conflicting judgments issued by different Member States in cases of Community fraud generating criminal proceedings against a number of parties. On 21 September 2012, the Court of Appeals in Sofia reviewed the judgment of the court of first instance that had sentenced a Bulgarian businessman to 12 years in prison for fraud in obtaining funds from SAPARD and money laundering, finding him not guilty. He had been accused of obtaining EU funding to purchase agricultural machinery in an improper manner, since the goods did not meet the requirements to receive contributions. The goods came from Germany, so that the owners of German society were also involved in the investigation as participants in the alleged fraud. The fact is, though, that the representatives of the German company, investigated, indicted and tried in Germany, were convicted in a final judgment. A. VENEGONI, Some good reasons for the establishment of a European Public Prosecutor's Office, in *Diritto Penale Contemporaneo*, December 17, 2012, [www.penalcontemporaneo.it](http://www.penalcontemporaneo.it)

6 OLAF is an autonomous office with its own organizational setup, director general and services, with complete independence in the conduct of investigations.

7 G. GARUTI, Right of defence of the suspect interrogated through international rogatory issued by the French court, in *Diritto penale e processo*, 2011, 12, 1535.

8 A. GAITO, The validity of the principle of speciality (concerning the European arrest warrant and extradition), in *Giur. It.*, 2004 7; G. GARUTI, Extradition and risk of inhuman treatment, in *Diritto Penale e processo*, 2012, 7, 905; C. SANTORIELLO, Note on extradition to foreign countries, comment on Cass. Pen. sect. VI, February 8, 2006 no. 10110, in *Giur. It.*, 2006, 10.

9 Conv. 26 July 1995 in *G.U.*, C, no. 316 of 27 November 1995, p. 49.

However, the EU highlighted that there were no cogent means to enforce the mandatory application of the rules contained therein<sup>10</sup>.

The important novelty is that the proposal for a directive of July 2012 contains a sub EU criminal justice system; in fact, it lists a number of crimes, with an indication of the conduct, as well as other general provisions of substantive criminal law, such as minimum and maximum limits of punishment, statute of limitations, the liability of legal entities, attempted crime or parties to a crime, which are to be introduced throughout the European legal area.

This last mentioned legislative instrument is of particular importance because it will probably be the starting point for the regulation of the European Public Prosecutor's Office.

After the entry into force of the Lisbon Treaty, the pillar structure of the European legal system was abolished and this led to the extension of the Community model to the field of criminal judicial cooperation, previously based on intergovernmental agreements. An indispensable prerequisite of any regulation is the value attributed to the Charter of Fundamental Rights, which has now assumed a legal status equal to that of the treaties and has become a binding parameter of legitimacy and interpretation.

This last point emphasizes the need to complete the process started by the Treaty of Lisbon in 2009, which should lead to the European Union's accession to the ECHR, to ensure the effective guarantee of the concrete exercise of the fundamental rights of EU citizens, including the right to a fair trial<sup>11</sup>.

## TOWARDS THE ESTABLISHMENT OF THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE

We now have a roadmap for the establishment of the European Public Prosecutor's Office, which began with the proposal of the EU Commission at the Nice Intergovernmental Conference in December 2000<sup>12</sup>.

The project involves creating a central office in Brussels, a body that will be independent both of national authorities and EU institutions, consisting of the European Public Prosecutor (the office will probably be elective) and a number of assistants; the office will also include a substantial number of "delegated" prosecutors at national level, chosen within individual national judiciary systems (of which they will continue to be a part), who will be responsible for the investigation of crimes within the competence of the European Public Prosecutor<sup>13</sup>. The in-

10 COM 2011, 293, final, 20 September 2011. This directive marks an important moment for EU criminal justice policy and far exceeds the principles contained in the Communication of September 2011, which outlined general principles and highlighting "the need that EU criminal law does not go further than what is necessary and proportionate in relation to its objectives" respecting individual Member States' choices.

11 S. CASSESE, *I Tribunali di Babele*, Rome, 2009, passim; GIUNCHEDI, *La tutela dei diritti fondamentali previsti dalla CEDU: la corte europea dei diritti dell'uomo come giudice di quarta istanza?*, in *Archivio Penale*, 2013, 1, 113; MARIANI MARINI – VINCENTI, *Le Carte storiche dei diritti, Raccolta di Carte, Dichiarazioni e Costituzioni con note esplicative*, Pisa 2013, p. 17 et seq.

12 A. IANNINI, *Procuratore europeo, difficile rapporto con i principi di indipendenza ed obbligatorietà dell'azione penale*, Report of the Ministry of Justice of 16 September 2002, in [www.europa.eu](http://www.europa.eu)

13 The draft regulation prepared by the EU Commission developed from a feasibility study conducted by a group of experts at the University of Luxembourg coordinated by prof. Kateren Ligeti. The work, funded by the EU Commission, started with a comparison of the criminal procedural laws of the EU Member States to elaborate common models for minimum standard rules to represent *model rules*.

roduction of the so-called “double hat” system, with a prosecutor that works both at the Italian Prosecutor’s Office under the control of the Italian public prosecutor, and at the European Public Prosecutor’s Office under the control of the European Public Prosecutor, poses delicate problems of coordination, independence, investigative choices, and also from the point of view of mandatory criminal prosecution, which is not provided for in all Member States. The offices of the delegated European prosecutors shall be appointed by Member States and shall have at their disposal all the investigative tools of the EPPO, from where they will receive instructions. For investigations conducted by the European Public Prosecutor, the territory of EU Member States shall be a single judicial area, so that rogatory letters will not be necessary. A specific register shall be introduced to circulate information on European crime and investigations, with the EPPO being responsible for coordinating and unifying the investigations and, in extreme cases, removing them to a higher office. Investigations undertaken by the delegated prosecutors shall make use of sources of European evidence from all Member States. However the process for the production of “European evidence” will not be a short one. In the case of investigations that affect the fundamental rights of the suspect, regulations provide for a prior authorization to be issued to the European Prosecutor by a court of the country in which the investigation is to be carried out. The stated aim of the EU Commission is to quickly produce a European code of criminal procedure with minimal rules accepted by all states so as to facilitate the investigations of the European Public Prosecutor and create European evidence that can be used in all member state courts (this would clear away any doubts about the rule to be applied in case of differences between the country where the evidence has been collected and that of the country where the trial is taking place).

The European Public Prosecutor will be responsible for the crimes of Community fraud, corruption and embezzlement, money laundering, smuggling of customs duties, offences relating to the award of contracts and crimes of tax evasion, as identified in the latest PIF directive, which is at present in the approval phase. In future, there is already talk of extending responsibilities to numerous other cross-border crimes, as envisaged by Article 86 TFEU<sup>14</sup>.

Today, it is hard to find a way of taking into account all the diversities existing in state systems, but it is equally true that it would be negative and of no use to be discouraged by the problems instead of trying to ensure that the establishment of the European Public Prosecutor’s Office is accompanied by guarantees for the defence and rights of citizens, which should have a greater or at least an equal standing when it comes to strengthening the instruments of fraud investigation.

In a detailed document dated 7 February 2013, the Council of Bars and Law Societies of Europe expressed considerable misgivings and doubts about the advisability of changing the current system to combat Community fraud, and that it

<sup>14</sup> In the study on the regulation made by the University of Luxembourg, Article 3 sets the following criteria to define the jurisdiction of the European Public Prosecutor’s Office: a) if it involves substantial damage to the interests of the EU, B) if the offence has a cross-border dimension, C) if the investigation involves EU officials; D) if there is a need to ensure equivalent protection for the interests of EU Member States.

<sup>15</sup> Council of Bars and Law Societies of Europe (CCBE), comments regarding the establishment of a European Public Prosecutor’s Office, February 7, 2013, in [www.ccbe.eu](http://www.ccbe.eu).

would be preferable to strengthen the investigative powers of OLAF<sup>15</sup>.

Before the EPPO can function properly, it is first necessary to have clear automatic regulations on the territorial jurisdiction of national courts in the case of cross-border crimes. The aim is to avoid easy shortcuts in the choice of the best state for proceedings to take place (as regards producing evidence, for example, or general procedural safeguards, or more severe punishments).

Another crucial area of the system is the regulation of relations between the European public prosecutor and delegated prosecutors, bearing in mind that the choice of head of the European Public Prosecutor's Office is obviously of political importance, with implications for the functioning of the system, even in the light of the "double-hat" system, as previously mentioned.

### INALIENABLE MINIMUM GUARANTEES

Apart from the investigative instruments which will be assigned to the new organ, there need to be strong, robust and effective guarantees for the defence.

The rules for the functioning of the system must be clear and ensure a minimum standard of common rules for all Member States<sup>16</sup>. To date, the existing system of judicial cooperation has often generated problems of interpretation due to lack of clear mechanisms, being based on "non-codified and elusive relations between disparate authorities responsible for investigations"<sup>17</sup>.

The Council of Bars and Law Societies of Europe has raised the question of the nature and structure of the Office, which may be qualified as a centralized or decentralized supranational authority in individual Member States. In the first case the problem is if it is compatible with the principle of national sovereignty of states, and in particular, "Should the EPPO be established on a centralised basis the European level state function would be given to a structure that is not a state, which raises questions concerning democratic legitimation, accountability and control as well as the question of the constitutional framework"<sup>18</sup>.

The procedures must avoid the risk of interference by the supranational authority in the judicial activities of national authorities. One particular problem will be regard the free circulation of the sources of evidence acquired in different Member States, which will require the establishment of common regulations for the acquisition and assessment of evidence as regards the rights of defence.

The European Court of Justice could be called on to provide judicial functions linked to the activities of the European Public Prosecutor; this can only happen on condition that the relative case law is consistent with that of the Strasbourg Court and that there is a uniform interpretation of the law for all Member States, above all in terms of the right of the accused to defence.

The simple right to defence, though, is not enough; it must be effective, a principle enshrined, in fact, by our Constitutional Court: it can only be effective if there

16 M. PISANI, *Il processo penale europeo: problemi e prospettive*, in *Riv. dir. proc.* 2004, 661 et seq.

17 Unione delle Camere Penali Italiane, European Observatory, *La Strada per l'istituzione dell'ufficio del Procuratore Europeo*, 5 April 2013, p. 1

18 Council of Bars and Law Societies of Europe (CCBE), comments regarding the establishment of a European Public Prosecutor's Office, February 7, 2013, in [www.ccbe.eu](http://www.ccbe.eu), p. 1

is the guarantee of the right to constant presence and the exercise of the right of defence as of the preliminary investigation phase - the mere conferment of the assignment is not sufficient<sup>19</sup>.

These are some premises and minimum expectations we would like to see as part of the establishment of the European Public Prosecutor's Office. The right to a fair trial, as governed by Article 6 ECHR, and the guarantee of effective defence must form the basis on which to establish the European Public Prosecutor's Office.

## THE RIGHTS OF THE EUROPEAN DEFENDER

At the same time, the "rights of the European defender", which the Osservatorio Europa dell'Unione delle Camere Penali Italiane has classified into two categories, need to be scrutinized and asserted. The first category involves identifying the rights of the accused in the minimum rules that govern the activities of the European Public Prosecutor, in line with the content of Article 6 ECHR, while the second concerns the introduction of regulations that can guarantee the assistance of an independent appropriately trained lawyer that can ensure effective defence.

The adversarial system involves the defence playing an active role even in the preliminary investigation stage, from the perspective of the production of evidence. From the very first phase of the proceedings the defender is entitled to carry out defence investigations to gather evidence in favour of his client, implementing the right of defence by proof<sup>20</sup>. The European Public Prosecutor regulations must ensure compliance with these principles by guaranteeing the participation of the defender in all acts which affect the fundamental rights of the person, like those already provided in our system. To be effective, defence guarantees need to include strict penalties in cases of non-compliance. Clear and peremptory penalties are essential for the effective exercise of the rights of the accused<sup>21</sup>.

The judicial review of the investigative acts of the European Public Prosecutor is indispensable and this competence can be assigned to a single European court or the courts of the individual Member States. Each scenario raises huge regulatory problems, but in any event there has to be a rigorous validation process and review of the provisions that affect the fundamental rights of suspects<sup>22</sup>.

In accordance with the principle of reasonable duration of proceedings (each person has the right to have his or her case dealt with in a reasonable time), it is essential that strict deadlines are set for the duration of preliminary investigations, to avoid problems also of an administrative nature for the accused (blocked disbursements or a ban on participation in EU tenders), arising from the mere fact of a pend-

19 C. Cost. March 17, 2010, number 106 in the official website of the Constitutional Court. We read in the decision: "Technical defence has a public law role which enables it to act as a guarantee for the proper exercise of jurisdiction", C. Cost. no. 59 of 1959, in the official website of the Constitutional Court.

20 O. MAZZA, *I protagonisti del processo*, in *Procedura Penale*, edited by O. DOMINIONI, P. CORSO, A. GAITO, G. SPANGHER, G. DEAN, G. GARUTI, O. MAZZA, Turin, 2010, p. 43 et seq. ; BARGI, *Le prove e le decisioni*, in *Procedura penale*, edited by A. GAITO, Milan 2013 p. 237 et seq.

21 F. GIUNCHEDI, *I principi, le regole, le fonti*, in *Procedura penale*, edited by A. GAITO, Milan 2013, p. 12 et seq.

22 G. RANALDI, *Cognizione del giudice penale ed accertamenti incidentali*, in *La giustizia penale differenziata*, edited by M. MONTAGNA, Turin 2011, p. 205 et seq.

ing suit for fraud offences to the detriment of the EU in the investigation phase.

Another important guarantee is the one on the right of the accused to access the European Public Prosecutor's acts of investigation, a right which can at most be precluded for a limited time and subject to a reasoned decision of the magistrate in cases where the dissemination of the acts could undermine investigations<sup>23</sup>. Naturally, acts of investigation should be made available to the accused whenever that person is in detention or arrest, in compliance with the right to be informed as soon as possible and in detail about the content of the charge, so as to have the time needed to prepare the defence<sup>24</sup>.

Other essential areas are the full translation of proceedings, public defence and the less well off. There can be no going back on these points, which represent a minimum standard of security, guaranteeing the effectiveness of defence for citizens, and promote a politically united Europe, which is today advocated more than ever.

The public defender, who, we may add, is not provided for in all member states, is a direct expression of the precept contained in Article 24 of our Constitution, which makes defence an inviolable right at every stage and level of proceedings, a technical defence provision that is an indefectible part of the system<sup>25</sup>. The fact that our system precludes the exclusive exercise of self-defence ensures a system of guarantees that is stronger than that envisioned by Article 6 ECHR, as confirmed by the European Court in its 1983 judgment *Rakelli/RTF*<sup>26</sup>. According to the European court, the choice of technical defence or self-defence translates "into a power of choice given, not to individual jurisdictions but to individuals, so that the recognition by national law of the right to self-defence does not, in itself, mean it complies with the Convention. Thus, it is vital to provide for the appointment of a public defender right from the start of proceedings before the European Public Prosecutor. In most cases the accused does not know that he or she is the subject of a European investigation and this secrecy can be justified only in cases where there is a risk of compromising the investigation<sup>27</sup>. In general, it would, then, be desirable for the a person under investigation to be given information on the right of defence, according to the model of our article 369 bis of the Code of Procedure, to be provided when the name of the accused appears on the register of crime reports, together with the appointment of a public defender and statement of the conditions for admission to legal aid.

These safeguards can also be made more effective by providing an adequate

23 G. SPANGHER, *In tema di informazioni ed avvisi al difensore della persona arrestata o fermata*, in *CP*, 1990, 282

24 S. FURFARO, *Publicità in cassazione e regole europee: incongruenze e ripensamenti inopportuni*, in *Arch. Pen.*, 2011, 982 et seq.

25 O. MAZZA, *I protagonisti del processo*, in *Procedura Penale*, edited by Q. DOMINIONI, P. CORSO, A. GAITO, G. SPANGHER, G. DEAN, G. GARUTI, O. MAZZA, Turin, 2010, p. 135 et seq.; G. DALIA, *Il nuovo ruolo del difensore d'ufficio e la disciplina del gratuito patrocinio*, edited by L. FERRAIOLI, in *Il nuovo ruolo del difensore nel processo penale*, Milano, 2002, 71 et seq.; F. GIUNCHEDI, *Difesa d'ufficio e giusto processo*, in *G.I.*, 2001, 2138; P. TONINI, *La difesa d'ufficio e il gratuito patrocinio in Francia*, in *RDPP*, 1983, 1449.

26 C. Eur., April 25, 1983, *RAKELLI* against GFR.

27 M. D'AGNOLO, *Gli accertamenti per la tutela dei non abbienti e l'ammissione al patrocinio a spese dello Stato, tutela costituzionale e sovranazionale*, in *La Giustizia penale differenziata*, edited by M. MONTAGNA, p. 436 et seq., Turin, 2011. As concerns the supranational sphere, Article 6 paragraph 3 of the ECHR recognizes that if the accused "has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require". According to the Court of Strasbourg, the existence of this interest must be assessed in relation to various parameters, such as the severity of the charge, the complexity of the case and the questions it poses, it being understood that this the case whenever the accused is punishable by a sentence of imprisonment (C. Eur., June 10, 1996, *Benham v. UK*, in *Dir. Uomo e lib. fondamentali*, 2006, no. 2, p. 460).



budget for the European Public Prosecutor's Office, ensuring at the same time the principle of equality of resources for investigations and for the defence of the accused, with the specific allocation of an item of expense for the legal representation of the less well-off.

A prerequisite for the exercise of the right of defence is also the knowledge of the acts of investigation in the language of the accused: the translation of the contents of all investigative acts must be provided explicitly and unequivocally. Translation cannot be limited just to judicial acts but must also include investigative acts and admitted documents.

It is also vital to involve specialised law institutions and associations of Member States in the preparation of the operational rules for the European Public Prosecutor's Office. A new class of criminal lawyers needs to be trained to defend the accused before European institutions.

Knowledge of European law is the new frontier for defence lawyers at national level in the new multi-tier system and at transnational level before Community Courts. The struggle for human rights has marked the history of mankind and "it is documented by the battles fought in all periods of time to make sure that society and its laws are founded on values of justice and respect for the individual." With the entry into force of the Lisbon Treaty in 2009, the fundamental rights recognized by the Charter of Nice are legally valid before all the courts of EU Member States, and of course in the courts of Strasbourg and Luxembourg. With the Charter of Fundamental Rights of the EU, law in Europe has changed radically; the legal effectiveness of the treaties granted to the Charter by Article 6 of the Treaty of Lisbon and the consequent recognition of general principles of European law given to the principles enshrined in the ECHR, have introduced a new system of law characterized by primacy of European law, from the perspective of interaction between national and international law and case law<sup>28</sup>. The expansion of fundamental rights recognized in the Charter of Nice has had a significant impact on the relations between domestic law and citizens, as well as in the relations between private persons<sup>29</sup>.

This then is the challenge awaiting future European criminal lawyers and, in this regard, the Italian presidency of the EU (2014) should be seen as an opportunity to place this issue at the centre of discussions, introduce programs and get adequate funding and resources to organize initiatives involving institutions and national bar associations<sup>30</sup>.

The road to the new figure of the European lawyer also requires the commitment of institutions and bar associations, which will have the task of helping to create new, cross-border, professional models. The training of lawyers must focus on

28 V. MANES, *Metodo e limiti dell'interpretazione conforme delle fonti sovranazionali in materia penale*, in Arch. Pen. 2012, 32; A. GAITO, *L'adattamento del diritto interno alle fonti europee*, in *Procedura Penale*, edited by Q. DOMINIONI, P. CORSO, A. GAITO, G. SPANGHER, G. DEAN, G. GARUTI, O. MAZZA, Turin, 2010, p. 25 et seq.

29 MANES, *La lunga marcia della Convenzione europea ed i nuovi vincoli per l'ordinamento e per il giudice penale interno*, in *La Convenzione europea dei diritti dell'uomo nell'ordinamento penale italiano*, edited by Manes, Zagrebelsky, Milan, 2011, 30 et seq.; G. BRONZINI, *Trattato di Lisbona*, in *Codice dei diritti umani e fondamentali*, edited by U. VINCENTI in collaboration with the *Scuola Superiore dell'Avvocatura*, p. 412, Pisa 2011.

30 ALPA – MARIANI MARINI, *I diritti umani e fondamentali nella formazione dell'avvocato europeo*, minutes of the conference promoted by CNF and the *Scuola Superiore dell'Avvocatura* with the patronage of the President of the Republic, Pisa 2010, p. 92 et seq.

the study of European law, proceedings before international courts, the languages and the principles of the law systems of Member States.

### THE ROLE OF LAW INSTITUTIONS AND BAR ASSOCIATIONS

The Treaty of Lisbon places paramount importance on the training of professionals in the field of justice (Articles 81 and 82 TFEU), but there is no explicit reference to the profession of lawyers. The European Commission intervened by including the training of lawyers as a priority among the objectives of the justice sector when the Stockholm Programme was approved. Then, in other communications, the Commission has underlined the role of lawyers and urged EU institutions and Member States to develop training courses on European law. The Commission, through the Directorate General for Justice, also directly organizes training programs for judicial staff, although it will be the responsibility of the law institutions and bar associations of individual states to cooperate and implement training projects on European law.

In addition to training and refresher courses, services will have to be introduced to ensure the rights of citizens, for example, as described by the UCPI European Observatory, “by setting up a kind of head office that is always open and which can provide the necessary information on the office of the public defender in all the languages of member countries.

The time is ripe for the establishment of a European criminal lawyers association with the aim of developing a common legal culture among lawyers and providing training and refresher courses for members.

Training for lawyers must be accompanied by training for interpreters, consultants and private investigators, with appropriate economic investments, as was the case in the past for the members of the judiciary in various cooperation projects carried out periodically and stably.

We need to foster awareness at Community level of the role of the lawyer in ensuring the basic rights of the accused, as opposed to the mistaken concept of a lawyer as a dealer of rights. Our profession is, in fact, mentioned in the constitution because it embodies responsibility in the implementation of an inviolable right: the right of defence. Today, the social role of the lawyer in Italy is even greater after the entry into force of the new professional law (No. 247/2012), which governs the bar system in compliance with the constitutional principles and Community law, having regard to the primary legal and social significance inherent in the function of providing defence.

### CONCLUSIONS

The European Public Prosecutor’s Office is a huge challenge and full of responsibilities at a time of deep crisis in the European Union. The office fits conceptually in the prospect of greater integration and this is a premise which can be shared. The project is in line with the vision of a federal model of the United States of Europe, the only system that can enable all EU citizens to live together while maintaining their individualities and remove the anti-European tendencies that threaten the deep sense of common coexistence.

Having said that, however, the simple debate on the rules and functioning of

the European Public Prosecutor's Office has already produced problems and doubts about the advisability of proceeding along these lines at present, and it would probably have been much more profitable and also financially beneficial to implement measures to boost judicial cooperation to achieve better results in the fight against Community fraud.

Today, we may say that there exists a European area of investigation, in that it is an area in which investigations can take place without barriers being placed in the way by the offices in charge. Taking account of this situation, we could have gone on to strengthen, in federalist terms, the cross-border investigative function of the competent EU authorities. This would have produced better results for EU fraud investigation without having to address the problems of harmonization of procedures for the production of evidence in criminal trials of individual states or other difficult issues as regards the functioning of the EPPO.

The EU Commission chose to activate the process of setting up the European Public Prosecutor's Office, initially responsible for EU fraud offences but which will continue to expand, eroding the powers of national jurisdictions in cross-border offences. The European Commission regulation proposal will shortly be disseminated and the process of legislative approval will begin. Italy will be holding the EU presidency in the second half of 2014 and it will be a very important and delicate time for the coordination of negotiations between the Member States to get the project approved.

It is the duty of lawyers to actively participate in the decision-making process as regards judicial cooperation and integration in the field of criminal law and they should be able to contribute actively in the system's development phase. So far the legal profession has been noticeably absent<sup>31</sup>.

Law institutions and bar associations have the duty, especially today, to make a commitment to ensure that in this phase of formulating rules for the functioning of the EPPO, the desire for effective investigations is at least equal to the protection of fundamental rights and guarantees for the defence of suspects. Our point of reference here is the ECHR, which together with the principles contained in the case law of the Strasbourg Court, will watch over the legality of the rules for the functioning of the new European judicial authority<sup>32</sup>.

31 D. BATTISTA, *Faccia a faccia a tutto campo*, in *Processo penale e giustizia europea, omaggio a Giovanni Conso*, *Atti del Convegno dell'associazione tra gli studiosi del processo penale*, Turin, 2009, 183.

32 A. VENEGONI, *L'Europa come spazio investigativo comune: verso il procuratore europeo*, in *Questione giustizia*, international observatory, June 28, 2013, [www.magistraturademocratica.it](http://www.magistraturademocratica.it). According to the author, investigations to protect the financial interests of the EU, as well as those for the application of competition rules, show that the EU can be considered an investigative area without territorial barriers. He points out the differences between the administrative investigations and the criminal investigations that the future European Public Prosecutor's office will be undertaking, underlining that "the concept of the EU as a common investigative area already exists for certain specific purposes, so its possible use in the investigations of the European Public Prosecutor, regardless of the form which it may take, would not in itself constitute something entirely new or unprecedented".

# Reflections on the compatibility of the rules that will govern the actions of the European Public Prosecutor's Office with the Italian Constitution

*Check against delivery*

**Vito Monetti**

*General Prosecutor of the Genoa "Corte d'Appello"*

*Welcoming the creation of a European Public Prosecutor's Office, the Author refers to the essential points of Article 86 of the Treaty on the Functioning of the European Union to provide guidance on the compatibility of the rules that will govern its actions with the Italian Constitution, and in particular with the principle of equality and the right of defence. Focusing on the importance of having rules on the admissibility of evidence and on conflicts of jurisdiction, the author looks at the role that could be played in this by the European Union Court of Justice.*

The establishment of a European Public Prosecutor should be seen as a very positive development.

The creation of a new organ of justice is a very important step towards the integration of people's rights in Europe, especially when one considers that this initiative complements others being implemented in member States, all designed to ensure improvements in the rights of persons undergoing criminal proceedings. These include the Stockholm Programme and a list of rights that have gradually been updated and integrated<sup>1</sup>.

At the same time, the prosecution of crimes against the financial interests of the Union will become easier and more effective. These crimes, which at their most serious can involve criminal organizations, almost always involve corruption or at least the betrayal of institutional duties by the public representatives of individual Member States and the EU itself. Professional experience shows that the response of individual national judicial authorities does not take into full account the seriousness of these crimes. The establishment of the EPP will certainly reduce the risks of excessively bureaucratic collaborations.

With the adoption of regulations implementing the provisions of Article 86 of the Treaty on the Functioning of the European Union, the establishment of a European Public Prosecutor will effectively lead to a further transfer of sovereignty,

<sup>1</sup> Comunicazione della Commissione al Parlamento Europeo, al Consiglio, al Comitato economico e sociale europeo e al Comitato delle regioni, del 20 aprile 2010 - Uno spazio di libertà, sicurezza e giustizia al servizio dei cittadini.

in matters of criminal justice, from EU member states to a supranational body.

It is a situation which - in the Italian system - is governed by Article 117 of the Constitution. This states that legislative power is exercised by the State and the Regions in compliance with the Constitution itself and the obligations under the Community system.

But it should be added that this is not a new situation, given that a similar transfer of sovereignty took place when Italy acceded to the Rome Convention, which established the International Criminal Court.

Like all member states of the European Union, Italy is one of the 122 countries which, by signing and ratifying the Convention in 1998, accepted similar and even more far-reaching transfers of sovereignty in the field of criminal justice, which affected not only the powers of public prosecutors but also, and especially, those of judges. According to its Statute, the International Criminal Court may, in certain situations, take a given case away from the jurisdiction of a member state, assigning the investigation to an ICC prosecutor and the ruling to the ICC.

Despite the huge political-geographical dimension of this court, as far as Italy was concerned, and all other EU countries, the surrender of these sovereign powers seemed a natural thing to do, something that was perceived as in line with their constitutions.

The EPPO is a typical “criminal prosecution” body. As we know, in European countries public prosecutors are institutional figures but the roles they play and the powers they wield are very different in individual EU states. Nevertheless, in the international debate, the basic structure, tasks, and statutes of the office have long been drawn up, and from these indications very precise elements of positive law have been set out in the Statute of the International Criminal Court. The first indications were outlined in the “United Nations Guidelines on the Role of Prosecutors”<sup>2</sup>, drafted in 1990. They established that “*Member States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability*”.

A more structured approach was then adopted by the Council of Europe in Recommendation no. 19 of 2000<sup>3</sup>, which defined the prosecutor’s office as an impartial body, separate from the executive and within the sphere of the “judiciary”. It states that public prosecutors “*are public authorities who, on behalf of society and in the public interest, ensure the application of the law where the breach of the law carries a criminal sanction, taking into account both the rights of the in-*

<sup>2</sup> Adopted by the Eighth UN Congress on the Prevention of Crime and Treatment of Offenders Havana, Cuba 27 August - 7 September 1990.

<sup>3</sup> Recommendation 19(2000) of the Committee of Ministers of the Council of Europe on the role of public prosecution in the criminal justice system. Then, the so-called “Bordeaux Declaration”, namely: Opinion No. 12 (2009) of the Consultative Council of European Judges (CCJE) and Opinion No. 4 (2009) of the Consultative Council of European Prosecutors, Judges and Prosecutors in a democratic society.

And more recently the so-called “Magna Carta of Judges” (Fundamental Principles), the Consultative Council of European Judges - Strasbourg, 17 November 2010, where it is written: “The courts shall ensure equality of arms between the prosecution and the defence. An independent status for prosecutors is a fundamental requirement of the Rule of Law”.

*dividual and the necessary effectiveness of the criminal justice system”.*

Finally, it should be underlined that the Statute of the International Criminal Court assigns the Prosecutor’s Office a condition of independence and impartiality. The regulatory provisions of this statute represent the most formally important points in the political and institutional debate based on the documents of the United Nations and the Council of Europe. What emerges is a model of a public prosecutor that acts and exercises his or her powers in a logic similar to that of a judge, impartially and in accordance with the rights of private parties, a prosecutor’s office that is independent and organized according to criteria of transparency, consistency, accountability and, therefore, responsibility.

The choice of head of the European Public Prosecutor’s Office with the power to issue orders or instructions to his or her assistants does not seem to pose a problem. In 2006, in fact, there came into effect in the Italian system a reform of the office of prosecutor<sup>4</sup>, which has strengthened the position of judges holding these offices, which is functional to *“the proper, timely and uniform exercise of the power of prosecution”* and *“respect for the rules of fair trial by the office”*. Italian prosecutors have an obligation to adopt - for this purpose - organizational measures for the assignment of proceedings and the procedures to be followed. Formal mechanisms have been introduced that commit the judges who run the prosecutor’s offices to account publicly for their activities.

For the new European Public Prosecutor’s Office, it seems that the same principles should apply as in the Italian system: transparency in carrying out activities, a deep sense of independence and impartiality, a commitment to respect the rights of private parties - all this can and must represent the foundation of the legitimacy of these organs of justice.

The European Public Prosecutor’s Office was introduced, together with other organs of the Union, in Article 86 TFEU, an essentially constitutional provision.

As regards this article, we may observe that it:

makes no mention, not even in general terms, of any guarantees or the correlative and indispensable responsibilities of the European Public Prosecutor, and merely refers the matter to a future statute;

does not list the office’s competences as regards powers of investigation, prosecution and commitment of the accused to trial before national courts, where the EPP will act as prosecuting counsel. It makes no mention of any criteria to be used by the EPP in the choice of the pre-trial committal hearing judge nor of the national court where the EPP will be prosecuting;

contains no reference to the relationship of the EPP with the EU Court of Justice; refers the following matters to a future statute:

- I rules of criminal procedure that the PME is required to comply with,
- II rules on the admissibility of evidence,

<sup>4</sup> Legislative Decree 20 February 2006, no.106. Provisions relating to the reorganization of the public prosecutor’s office, in accordance with Article 1, paragraph 1, letter d) of Law 25 July 2005, no. 150. Law no. 269, 24 October 2006. Suspension of the effectiveness and changes to provisions relating to the judiciary.

III rules governing the judicial review of certain acts or measures adopted by the EPP.

These references to the essential points of article 86 TFEU are significant in general terms and for the purposes of an analysis that attempts to give a first indication of the compatibility of the office of European Public Prosecutor with the Italian Constitution.

On a general level, two points should be underlined.

On the one hand, we should bear in mind the indications that emerged from by a debate which took place recently at a very high institutional level. The Network of Prosecutors General of the Supreme Courts of the EU adopted a motion concerning the *European Public Prosecutor's Office*, which states - among other things - that the "*EPPO should be independent and accountable*"<sup>5</sup>. This is completely in line with the abovementioned Council of Europe Recommendation 19\2000, and the Bordeaux Declaration. But, above all, it is in line with the case law of the European Court of Human Rights which - albeit for the limited purposes of Article 5 of the Convention - established that the French *Procureur de la République* cannot be considered a judge because the office is not independent of the Ministry of Justice<sup>6</sup>.

In light of the above considerations, particularly as regards Italy's participation in the International Criminal Court, the real issue is not the compatibility of the new body with the Italian Constitution but, more concretely, the rules under which it is to operate. Thus it regards:

- the level of guarantees that a transfer of proceedings to another country would involve;
- the provisions of Article 3 and Article 24 of the Constitution;
- the question of which European court will have the final say over the country where proceedings are to take place;
- the existence of legal mechanisms that allow private parties to "influence" the content of that decision, exercising their right to defence also for these purposes.
- the problem of "forum shopping" and the juridical solution that will be given to the problem of identifying the competent judge, taking into account that this problem will arise twice - in the choice of pre-trial committal hearing judge and, subsequently, the trial judge. As we said, this issue must be resolved with the use of instruments specific to criminal trials, i.e. through dialectics and the decisions of a third body, apart from prosecution and defence, i.e. decisions taken by a judge, by a court;
- the rules that govern the admissibility of evidence.

The aforementioned document that concluded the Network of EU Prosecutors

5 6th Meeting of the Network of General Prosecutors of the Supreme Courts of the European Union; Section 8, (Krakow, May 2013) .

6 Medvedyev and others v. France, 2008 and, then, Moulin v. France 2010; and the recent: Vassis and others v. France (62736/09), 27.6.2013

General meeting in Krakow<sup>7</sup> called for “rules on admissibility of evidence and the resolution of possible conflicts of jurisdiction”.

In the previous section we looked at the links between the principle of equality and the right of defence, as defined in Articles 3 and 24 of the Italian Constitution, and some of the issues raised by the creation of a European public prosecution office, with reference to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Since we shall now focus on aspects of supranational significance regarding the above issues, particularly those identified by the EU Network of Prosecutors General, we shall take a look at what may be identified as the political and juridical starting point.

This is the Stockholm Programme<sup>8</sup>, which aims to introduce “*common minimum rules (which) should lead to an increased confidence in the criminal justice systems of all Member States, which in turn should lead to more efficient judicial cooperation in a climate of mutual trust.*”

It is a clear (and very positive) declaration of intent, which is based on an evident observation made by European lawmakers, namely that the level of protection of rights in criminal proceedings in individual Member States is not homogeneous and, thus, needs improving.

- We know that the Stockholm Programme originally identified five procedural rights:
- Right to Interpretation and Translation
- Right to Information about Rights and Accusation,
- Right of Access to a Lawyer in Criminal Proceedings and the Right to Communicate upon Arrest,
- Special Safeguards for Vulnerable Persons,
- Legal Aid for Suspects.
- Subsequently, other situations were identified and the rights that should receive procedural protection:
- Pre-Trial Detention,
- Presumption of Innocence.

Far from being exhaustive, the road map outlined in the program is not detailed enough. The first directives adopted offer very interesting insights into the rules required to regulate the activities of the European Public Prosecutor. In particular, two “clauses” should be mentioned, which are included in both directives, namely:

Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings;

Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.

This is the right to *legal remedy*, concerning which we find this provision in the first and second directives:

<sup>7</sup> Supra, footnote 3

<sup>8</sup> Supra, footnote 1



Article 2.5. Member States shall ensure that, in accordance with procedures in national law, suspected or accused persons have the right to challenge a decision finding that there is no need for interpretation and, when interpretation has been provided, the possibility to complain that the quality of the interpretation is not sufficient to safeguard the fairness of the proceedings.

Article 8.2. Member States shall ensure that suspects or accused persons or their lawyers have the right to challenge, in accordance with the procedures of national law, the possible failure or refusal of the authorities to provide the information in accordance with this Directive.

And the non-regression clause, expressed in identical words in both directives:

*Nothing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Charter of Fundamental Rights of the European Union, other relevant provisions of international law or the law of any Member State which provides a higher level of protection.*

These two regulations require States to:

- improve internal laws that are not sufficiently protective of rights, not only by introducing appropriate regulatory provisions but also by ensuring the effectiveness of these rights, providing the interested parties with the juridical instruments to have them enforced;
- respect the choice of country that offers most guarantees;
- returning to the European Public Prosecutor's Office, whose institutional activity can be identified precisely in relation to its role as an organ of investigation and prosecution, endowed with competences that span the entire territory of the Union, we must ask what reference can or should be made, if any, to the Stockholm Programme. Thus:
- Will the directives that introduce these rights in the EU legislative system be applicable to the investigative activities of the EPP? Or it must be assumed that the 5 + 2 criminal procedural rights will be in force only if and to the extent that these rules are implemented in an individual European country in whose system the EPP conducts investigations?

What criteria are to be used to select the country where certain parts of an investigation or preliminary investigation are to be carried out? Will the EPP be able to choose a country where the criminal justice system offers the most effective and pervasive investigative powers or will he or she have to choose a country which (once all the seven directives of the Stockholm Programme have been adopted) offers the highest level of protection for people undergoing proceedings?

The two questions which we shall now discuss can and should be considered from the "national-domestic" point of view. We must ask ourselves how the constitutional courts of individual countries might react to European rules setting out a criminal policy involving one of these choices.

A first observation that can be made in this regard is that it would be totally unacceptable to argue that these are legislative decisions that concern an organ of the Union, a sort of *interna corporis*. It is true that the EPPO operates over the vast territory of Europe but procedurally the office operates as an organ of investigation

and prosecution within a single national judicial system.

For the sake of completeness, it must be added that an anomic situation could lead to questionable choices and violations of fundamental principles, first and foremost that of equality. For example, in some systems, measures restricting freedom or privacy are authorized by a public prosecutor while in others by a judge.

These last considerations regard the criminal procedure system or systems in which the EPP chooses to carry out investigations. But, as we said before, the problem comes up again in exactly the same terms in the choice of trial judge. And in this regard, mention must be made of a document approved last May in Krakow by the Prosecutors General of the EU Supreme Courts, which underlined the need for the adoption of rules on admissibility of evidence.

The choice of the trial judge involves the solution to the problem of the rules on admissibility of evidence.

As we know, this issue was addressed in the *Corpus juris*. This very important document, which laid the ground for the current political-institutional debate, stated that during the investigation phase, evidence was to be collected in dialectical and participated forms. It spoke of a “European evidence report.” But it must be emphasized that an identical institution is also present in the Statute of the International Criminal Court: when there is a *unique opportunity* to gather proof, Article 56 states, in fact, that this evidence shall be collected in a special hearing before the Pre-Trial Chamber, with the participation of the counsel for the defence.

To conclude this section, we shall pose a question: what role can be played by the Court of Justice of the European Union in this matter and as regards the problems that we have been looking at, and those we shall analyse in the next paragraph?

As already mentioned, the Network of Prosecutors General of the Supreme Courts of the European Union, in the document approved in Cracow, called for rules for the “*resolution of possible conflicts of jurisdiction.*”

We have mentioned on several occasions that as regards the territorial jurisdiction of the office, the EPP must necessarily refer to a transnational territory (more or less extensive, depending on the number of participant countries). The office may seek the cooperation of individual national prosecutors, each acting in accordance with their domestic legal system.

However, if the EPP is given these choices, the choices will obviously not be able to condition the judge that is chosen.

Whether it be a pre-trial committal hearing judge (to get a temporary measure, limiting freedom of movement, privacy, or property right) or a trial judge, both will have, and it cannot be otherwise, competences deriving from their own jurisdictions. Clearly, then, this may give rise to conflicts; it is equally clear that such conflicts, whether they are positive or negative, whether they regard the distribution of competences between the judges of the same country or jurisdiction among judges of different countries, they must be resolved by a ‘higher’ judicial authority. When the conflict is a question of competence, it may be assumed that the solution will be found (and will continue to be found, even when the action stems from the EPP) in accordance with the internal rules of that particular country. But in the case of

a conflict of jurisdiction, this must be settled by a supranational court.

From an initial and summary analysis of the matter, it would seem that this should be the European Court of Justice, as part of its general competence to rule on the legality of acts carried out by an organ of the Union, especially when these acts affect or infringe individual rights.

This observation leads to the final section of this short paper, the one dedicated to the relationship between the European Public Prosecutor and the two European courts, the EU Court of Justice and the European Court of Human Rights.

We have just spoken of the question of the general competence of the Court of Justice to rule on the legality of acts carried out by a body of the European Union and the possibility of the Court being called on to review the legality of actions carried out by EPP.

As an initial contribution to the analysis of an issue that deserves far deeper analysis, it may be useful to refer to certain principles that were laid down in a recent decision of the European Court of Justice<sup>9</sup>.

Basically, the Court had been asked to resolve a negative conflict of competence between national authorities in the sphere of personal rights. It was a question of identifying the state that was competent to adopt acts of an administrative nature, but this decision obviously had a bearing on all the consequences that such acts involve, including those of a jurisdictional nature.

In particular, in interpreting Regulation (EC) no. 343/2003 of the Council of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. The Luxembourg Court resolved the conflict by indicating the criterion for assigning jurisdiction in the following terms: *“The Member State responsible for examining the asylum application of an unaccompanied minor who has lodged application in several Member states is the one in which the minor is present after having lodged an application there.*

Where the decision of the EUCJ resolved a negative conflict, a ruling of the Strasbourg Court settled an issue involving the opposite perspective. It concerned, in fact, national laws which allowed the public prosecutor to go *forum-shopping*; in particular, the claimant complained of a breach of rights protected by the Convention, a violation produced by laws that gave the public prosecutor the “irrevocable” right to choose the trial judge.

The judgment regarded Malta<sup>10</sup> and, in particular, the provisions of a law which - as we said - gave the prosecutor the right to choose the court before which the accused was to be tried for certain crimes. Depending on this choice there were significant consequences as regards the duration of the applicable punish-

<sup>9</sup> Judgment Case C-648/11 MA , BT, DA / Secretary of State for the Home Department  
10 Camilleri v. Malta – 22 January 2013 - 42931/10

ment (the maximum punishment varies from ten years imprisonment to life imprisonment, depending on whether the accused is judged by the “*Criminal Court*” or “*Court of Magistrates*”). In this case, the claimant was under investigation for the crime of drug dealing, committed in conjunction with another person. The prosecutor used the discretionary power given to him, which cannot be called into question, committing both the accused to trial: one (namely the person who then brought the question before the Court of Human Rights) before the Criminal Court, and his accomplice before the Court of Magistrates.

The consequence was that the same act of being party to a crime had led to the imposition of punishments of very different degrees of severity. The person who received less favourable treatment appealed to the Court of Human Rights, claiming a breach of both Article 6 and Article 7 ECHR.

The European Court of Human Rights stated that in this situation there was a breach of the principle of predictability, which is, in fact, enshrined in Article 7, a violation so clear that the Court considered it superfluous to examine a possible violation of Article 6. It is worth quoting the main points of this ruling:

*“The Court first examined the possibility of a violation of Article 7. This sets forth the principle that only the law can define a crime and prescribe a penalty. It follows that offences and the relevant penalties must be clearly defined by law.*

*This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts’ interpretation of it, what acts and omissions will make him criminally liable and what penalty will be imposed for the act and/ or omission committed (see Scoppola against Italy (n.2) [GC], no. 10249/03, § § 93-94, 17 September 2009). It is necessary, then, to ascertain whether the Maltese law satisfies the requirements of accessibility and predictability, regard being had to the manner of choice of jurisdiction, as this reflected on the penalty that the offence in question carried. In the present case, the applicant knew which of the punishment brackets would apply to him only when the Attorney General had determined the court where he was to be tried.”*

This, then, is a clear violation of the principle of predictability. But it is interesting and important for the purposes of the issues analysed in this paper to look at the following passage from the judgment, the one that precedes the statement of the violation of the right protected by the Convention (to facilitate discussion, the text is reproduced here in separate points):

*“Any criteria used by the Attorney General in arriving at his decision were, in any event, not published:*

- *any such criteria were not specified in any legislative text or made the subject of judicial clarification.*

- *The decision was inevitably subjective and left room for arbitrariness, particularly given the lack of procedural safeguards.*

It seems unnecessary to comment on statements that are crystal clear. We may add that this makes it even more important to establish in advance the criteria to be used by the European Public Prosecutor in the selection of pre-trial and trial judge.

There is the possibility that evidence against the accused may be collected in

different states, each with different systems and rules of procedure<sup>11</sup>; there is the possibility that - in the absence of European rules of evidence – this evidence could be presented to a trial judge whose national legal system is especially devoid of procedural guarantees.

It is to be hoped that European lawmakers will take into account the principles set out in the two abovementioned judgments of the European Court of Justice and the European Court of Human Rights, respectively. A different solution would subject the activity of this important organ of justice to a double risk: that of finding itself in situations of functional paralysis, in the event of (positive or negative) conflicts of jurisdiction, and that of finding itself sanctioned for violating of one of the rights protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms – the principle of fair trial or the principle of predictability.

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<sup>11</sup>By way of example, we can mention the the statements made during investigations, to the police or a public prosecutor (independent or not); the mandatory presence of a defender when the statements are collected; the question of the direct or mediated usability of the contents of these statements as evidence. Or, the question of interception of communications; can be ordered by a court or other non independent body; the question of interception of communications via the Internet, as regards accessibility without national borders; with particular reference to financial transactions and online banking

# The cultural and legal impact of the EPPO: the perspective of the Italian system

*Check against delivery*

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*In anticipation of the European Commission proposal for a Regulation establishing a European Public Prosecutor's Office (EPPO), the author examines various hypotheses. More specifically, she considers that, in the absence of an ad hoc legal basis, a European judge cannot be assigned the office of Judge of Freedom. As regards the contribution of the Italian Presidency of the EU to the discussions on this issue, the author identifies some particularly important aspects which need to be examined: provisions for the (internal or external) review of EPPO actions, the identification of criteria for determining the competent court and the role of defender.*

## EPPO: AN INSTITUTION STILL TO BE CREATED WHICH GOES BACK IN HISTORY

In order to reconstruct the possible impact on the Italian legal system of the future EPPO, it is obviously essential to try to understand precisely the nature of future European Public Prosecutor's Office.

Although, as far as we know, the EPPO statute will probably not be made public before the beginning of July, the debate on the nature of this office must continue, especially as it has been going on for almost the last twenty years.

The main sources are well known: the first and second version of the *Corpus Juris*, from 1995 and 2000<sup>1</sup>, respectively; the 2001 *Green Paper*<sup>2</sup>, the 2007 Spanish Presidency revisions<sup>3</sup>, the communications of the Parliament and of the Council<sup>4</sup>, the recent Luxembourg University project<sup>5</sup>.

1 See the four volumes of Delmas-Marty M., Vervaele J., (Eds.) 2000 *La mise en œuvre du dans les Etats membres Corpus Juris (The Implementation of the Corpus Juris in Member States)*, Intersentia, Antwerpen – Groingen Oxford

2 See the documents and the reports on the responses to them, respectively, at: [http://ec.europa.eu/anti\\_fraud/documents/fwk-green-paper-document/green\\_paper\\_it.pdf](http://ec.europa.eu/anti_fraud/documents/fwk-green-paper-document/green_paper_it.pdf)

[http://ec.europa.eu/anti\\_fraud/documents/fwk-green-paper-suivi/follow\\_up\\_en.pdf](http://ec.europa.eu/anti_fraud/documents/fwk-green-paper-suivi/follow_up_en.pdf)

3 See J. A. Espina Ramos and I. V. Carbajosa (eds) *The Future European Public Prosecutor's Office*, available free for download on line.

4 See *ex multis*, emblematically, 2000 COM (2000) 608 final, Brussels, 29.09.2000, *Communication from the Commission. Additional Contribution to the Intergovernmental Conference on Institutional Reforms. The criminal protection of the Community's financial interests: a European Prosecutor*, and, after the entry into force of the Lisbon Treaty, Council of the European Union, Brussels, 15 April 2010 (16/04) (OR. es) 8614/10 JAI 306 COPEN 99 EUROJUST 43 *Notes from Presidency to Delegations, Subject: The European Public Prosecutor's Office in the European judicial area.*

5 See *Draft Model Rules, The European Model Rules for the Procedure of the European Public Prosecutor's Office*, also available in French at the University of Luxembourg website, <http://www.eppo-project.eu/> and the book *Toward a Prosecutor for the European Union, volume 1, A Comparative Analysis*, ed. K. Ligeti, Hart Publishing, 2012, which includes the contributions of the countries involved.

We also know which points are relatively uncontroversial and those that have been hotly debated from the beginning. In this regard, Article 86 TFEU, although ambiguous in many respects, gives us an outline of the first points and provides the basis for the solution of the second. The public prosecutor will be an organ of the Union; it will be able to act in a judicial sphere comprising the sum of the areas of all participant member countries; initially, at least, it will only prosecute crimes against the financial interests of the Union before individual national criminal courts.

It will then be up to the regulations instituting the office to define its organizational structure and set the rules under which it is to operate. They will specify the guarantees of a judge for its investigative measures that restrict individual rights [such wire-tapping] and, more broadly, the forms of judicial review for EPPO power to bring the case before the court or to dismiss it. They will also specify the relationship between the new institution and individual national authorities, “from”<sup>6</sup> Eurojust.

It is of no specific significance from the standpoint of this reflection, in anticipation of the measure drafted by the Commission, which actions will be subject to judicial review and whether there will be any mitigation of the principle of mandatory prosecution, which, for example, could be regarded as precluded in the case of compensation for damages.

It is certain that, lacking a juridical basis for the creation of a new European judge, the “*judge of freedoms*”, with more or less extensive competences up to the beginning of the trial stage<sup>7</sup>, will be a national judge, in accordance with the model outlined in the *Corpus Juris* and then in part adopted in the measure concerning the European arrest warrant, which, not by chance was issued shortly after the second version of the abovementioned study on comparative law.

Equally high is the probability that, irrespective of the individual regulations that are still being drafted, the Union will opt for a central body, a collegial structure, where the representatives of individual Member States will operate through national delegates, who will have, according to a colourful but effective expression, a “double hat”: having the powers typically granted to them under national law, powers that delegated public prosecutors will use to investigate crimes against the Union’s financial interests specifically and those under their own domestic law<sup>8</sup>.

6 On the problems of the various versions of the Treaty of Lisbon, and the language in general, from the viewpoint of linguists and comparative law specialists, see the contributions contained in Various Authors *Criminal Proceedings, Languages and the European Union, Linguistic and Legal Issues*, Springer-Verlag Berlin Heidelberg, 2013, and, as regards Article 86 TFEU, the analyses of Mauro, Marcolini and, if you wish, Ruggieri, on the versions of the Treaty in French, Spanish, and German (compared to Italian and English).

7 When the decision is made about prosecution or dismissal. The lack of a legal basis for a (new) EU criminal judge would make it impracticable to implement Delmas-Marty’s proposal, suggested at the end of the work of the second version of the *Corpus*, concerning the establishment of at least one (common) ‘preliminary investigation judge’ who would examine the grounds for prosecution or dismissal. This option would allow for a judicial review of a case at a very delicate moment: i.e. the ‘European action without European jurisdiction’ of the future European Public Prosecutor’s Office, to identify the national jurisdiction for the trial to be held.

8 For the different hypotheses, see most recently and in detail (including helpful summary tables) S.White, *A Decentralised European Public Prosecutor’s Office Contradiction in Terms or Highly Workable Solution?* in *Eucrim* 2012 n.2 p. 67 ff., *ibid* also further studies, for example in the context of substantive criminal law as regards offences affecting the financial interests of the Union (an issue of the magazine devoted entirely to the EPPO is available at [http://www.mpicc.de/eucrim/archiv/eucrim\\_12-02.pdf](http://www.mpicc.de/eucrim/archiv/eucrim_12-02.pdf)).

## THE INFLUENCE OF THE NEW BODY ON THE LEGAL SYSTEMS OF MEMBER COUNTRIES.

Despite the fact that, or perhaps precisely because, the new organ will necessarily be the result of compromise between legal traditions that are very different from one another<sup>9</sup>, the impact on our system will primarily be of a cultural nature, in the broad sense. Whatever solution is chosen, it is clear that our country, like all other member states, will have to adapt to a certain extent when it transposes the provisions of the Union.

As partly already happens in Eurojust, the Italian representative, who by necessity will be a “magistrate” (i.e. not a simply police officer)<sup>10</sup>, will have to work with colleagues who do not necessarily have the same role in their country of origin or with officials that might not have any legal experience as “magistrates”, operating in jurisdictions that are very different from ours. Although the representatives of member states will try to simplify things as much as possible by delegating the various preliminary investigation activities to their local counterparts, who will apply their respective national procedural rules, they will inevitably have to contend with procedures that may be quite different from their own.

Even today, as we know, within the limits of the functions and roles of Eurojust, in which framework decisions have been made to implement the principle of mutual recognition, international judicial cooperation has to contend everyday with different worlds and multicultural scenarios. However, what today is a complex and often occasional tangle of relations between offices of different sovereign systems, based on principles that still echo the traditions of a model of cooperation between states that is “horizontal”, future cooperation will necessarily have to come in the form of a much more ductile “vertical” approach<sup>11</sup>, with all the problems that such an approach involves: from the different levels of subordination between the central and local offices to the limited but common discipline regulating prosecution and, above all, the choice of competent national court<sup>12</sup>.

The scenario created by the EPPD can be effectively described by what in future will be qualified as a an area of justice (i.e. the territory of the Union’s Member States considered as a single legal area), which will not be the simple sum of the sovereign territories of Member States. It will be the result of a form of coop-

9 The use of English as a “lingua franca”, which is now a long way from the technical vocabulary of Great Britain, is functional to creation of an extremely flexible working tool, allowing the various representatives of Member States to easily determine the institute which is in part or wholly equivalent to one proposed in the EU measure.

10 Not being applicable the ruling of Italian Constitutional Court in sentence 6.4.2011, n. 136, which upheld the legitimacy of the rule concerning the national member of Eurojust since the latter is an authority which does not exercise judicial functions. (For a comment on this ruling, see C. Prota, *La Corte costituzionale esclude la natura giudiziaria di Eurojust*, in *Cass. pen.*, 2011, p. 4278 e G. De Amicis, *La Corte costituzionale nega la natura giudiziaria di Eurojust: una pronuncia discutibile*, in *Forum di quaderni costituzionali*, 2011).

11 For these concepts, which have now become traditional cf. *The implementation of the Corpus Iuris in the Member States*, M. Delmas-Marthy, J.A.E. Vervaele (eds), Vol. IV, Ed. Intersentia, Antwerpen – Groingen Oxford, 2001.

12 For a summary of these issues, in the light of the provisions of the *Corpus Iuris* in 1997 (and therefore limited to the fifteen Member States, before the enlargement of the third millennium) see *La mise en oeuvre de Corpus Iuris dans le Etat Membres* M. Delmas-Marthy, J.A.E. Vervaele (eds), Ed. Intersentia, Antwerpen – Groingen Oxford, 2000, vol I, pp. 317 ff. for the introduction of M. Delmas-Marthy and J. Spencer and then the various summaries of the national reports and the compatibility tables (ibid, ff 341, 364-5, where the individual systems, in comparison with the provisions of the *Corpus* are considered to be *totalement compatible*, *compatible après modification* dans *législation nationale*, *compatible après modification Constitutionnelle*, *compatible après modification dans le Corpus juris*, ovvero ancora *compatible après autres modification*.



eration in which national bodies will act in the interests of the EU, in an ever closer synergy involving all the EPP's assistant prosecutors. In terms of numbers, though significant in relation to the total budget of the Union<sup>13</sup>, the quantity of proceedings, at least initially, will not be that great. However, the impact this kind of *modus operandi* may have in practice on each Member State should not be underestimated, in particular as regards the creation of a common European consciousness.

Especially if, as is likely, the initial proposals will tend to be "minimalist" so as to achieve the greatest degree of consensus, the double role of the national representatives will represent a particularly incisive instrument to foster a shared culture of investigation. We know the Union is built primarily on ever deeper reciprocal knowledge, which is at the heart of the principle of mutual recognition.

### INDICATIONS (AND HOPES) FOR THE ITALIAN SEMESTER

What then could Italy contribute, in juridical terms, to a discussion which will probably reach its climax during our country's semester in 2014?

As we know, within a scenario made up of a variety of European systems, ours has a history all of its own. Moulded on the French model at the time of Italian Unification (1860), drawn towards the German and Austrian systems during the Finocchiaro-Aprile reform (1913), partially reworked back to the French model with the 1930 code, and finally influenced by the process of *common law* during the recent Republican reform (1989)<sup>14</sup>, our criminal trial can rightly be considered to be a melting pot of experiences and, in particular, a kind of bridge between the culture of *civil law* and the Anglo-Saxon tradition.

Our public prosecutor's office, though still organised internally according to French tradition but no longer dependent on the executive power as far as external organization is concerned, has to contend every day with a principle, that of mandatory prosecution, which is applied less and less in practice. Bringing our experience on this subject, which cannot be summarized here<sup>15</sup>, to the European debate means sensitizing future European lawmakers to the principle of equality in criminal prosecution: namely, the need to guarantee a trial (a decision from a judge), even in the context of different jurisdictions, whenever the preliminary investigations of the EPP come up with sufficiently strong elements for prosecution.

This can be achieved, irrespective of the principle of mandatory prosecution (impossible in practical terms in any Western system because of lack of resources), only by means of an appropriate system of controls. Whether these controls are from within the EPPO or preferably entrusted to a judge, the essential thing is not to assign the EPP an autonomous and self-sufficient power to prosecute or to dismiss.

Also with regard to the principle of "natural judge"<sup>16</sup>, which has a long tradi-

<sup>13</sup> The data can be easily derived from the annual reports of Olaf and Eurojust.

<sup>14</sup> See, if you wish, F. Ruggieri, *L'italiano giuridico che cambia: il caso della procedura penale*, in *Cass. pen.* n.3/2012, § n. 402, pp. 1131 ff. for a summary of the different phases of studies on comparative law in criminal proceedings, with regard also to the various codifications made since the 1865 Code.

<sup>15</sup> See, most recently, the column *Opinioni a confronto* on the subject of mandatory prosecution (involving Botti Marzaduri and Miletti) in *Criminalia* n. 5/2010 and, if you wish, F. Ruggieri, *Pubblico ministero (diritto processuale penale)*, in *Enciclopedia del diritto, Annali II*, volume I, Giuffrè, Milan, 2008, pp. 998 ff. and *Eadem Azione penale*, in *Enciclopedia del diritto, Annali III*, Giuffrè, Milan 2010, pp. 129 ff.

<sup>16</sup> As regards Europe, see M. PANZAVOLTA, *Il giudice naturale nell'ordinamento europeo: presente e futuro*, in M. G. COPPETTA, *Profili del processo penale nella Costituzione europea*, Turin, 2005, p. 110.

tion in our legal system, the Italian perspective can make a strong contribution to the debate in Europe. The problem that arises in (European) prosecution without a judge of the same level (i.d. only domestic) is the identification of the (national) court before to which to bring the case. Even if we may presume that the establishment of the EPPO will also involve a high degree of harmonization of crimes against the Union's financial interests, and even if, inevitably, there will have to be some form of "common" circulation of evidence collected by the EPP between one system and another, it is equally clear that national courts will keep many of their own characteristics. Thus, in practice, the option of one country rather than another (even if only for the sake of efficiency) will tend to affect the choice of the domestic judge, something which should be done in a way that is absolutely disinterested. The criterion of *locus commissi delicti*, apparently the most reliable, must take into account the difficulty of identifying the place where an offence was committed in complex cases of fraud, which usually involve not only several states but also, and above all, several parties (physical and legal). Italy's experience in this could play a significant role.

Finally, our legal system, because of its dual nature of an "adversarial" system with a continental tradition, could contribute to defining the role of lawyer: both in relation to "mandatory defence" (i.e. a lawyer must be always in criminal trial: something which not all member countries are acquainted with and which could also be imposed less rigidly, for example depending on the severity of an offence), and, in particular, with reference to investigations carried out by the defendant's lawyer, something which is by no means unheard of in most *civil law* systems.



