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Background paper

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1. Introduction: a new era for the protection of the EU's financial interests

2017 was a good year for protecting the financial interests of the European Union. On July 5th, 2017, at a plenary session of the European Parliament, the text of the directive on the protection of the European Union's financial interests by means of criminal law (the 'PIF Directive') was approved at a second reading[1] and, following a unanimous finding by the European Council of February 2017, Council Regulation (EU) 2017/1939 on the legislative proposal for the establishment of the European Public Prosecutor's Office (EPPO) was adopted on 12 October of that year[2].

The regulation established by the PIF Directive will become effective on its adaptation by each of the EU member states, which must be completed by 5 July 2019; the regulation came into force last November in the twenty member states that have joined the enhanced cooperation network, but excluded the Netherlands, Poland, Malta, Sweden, Hungary, Denmark, Ireland, and the United Kingdom. The EPPO will assume the tasks of investigation and prosecution provided at a later date - to be established by decision of the Commission on the proposal of the European Chief Prosecutor - not earlier than three years after the entry into force of the Regulation[3].

It would be misleading to believe that the path that led to the adoption of these two regulatory instruments was easy, and illusory to think that the problems with regard to its adoption are now solved. In fact the use of enhanced cooperation has raised new questions, and the topic remains very timely: it is precisely these problems that must be confronted in order to have a consistent application of the EPPO Regulation and the PIF Directive. This is the objective of the "**Enhanced cooperation for the establishment of a European Public Prosecutor**" international conference, organized by the Lelio and Lisli Basso Foundation, to be held in Rome on 24 and 25 May 2018. In this context, this background paper aims to stimulate debate between the experts, academics, officials, and judicial officers who will take part in the conference.

2. The EPPO: reticence and new doubts

Not all member states share the belief that the intrinsic "Europeanness" of widespread and serious criminal acts that are detrimental to the financial interests of the EU justifies –let alone requires –the immediate coordination of investigations and prosecutions at the European level (for the protection of the common good by the EU and its member states[4]). Reticence and lack of determination on the part of some states have caused – and still maintain– an insoluble delay in the process of unification. Despite the

ambitious provisions of its treaties, the EU is not yet ready for "judicial sovereignty"; this creates a context in which criminal activities can thrive. In these circumstances, a simplified form of cooperation is provided for by article 86 of the Treaty on the Functioning of the European Union (TFEU), a clear demonstration on the part of the compilers of the treaties that they favour this institutional option, which is presented as the only means available to overcome the stalemate [5].

The establishment of the EPPO through enhanced cooperation undoubtedly constitutes one of the most developed fronts in the debate on European integration, and there are countless arguments in favour of assisting the achievement of the objectives set out by the EC, particularly with respect to what would have happened had such a project been abandoned[6]. However, such an institutional way of viewing the issue carries with it many questions which deserve further investigation, even without considering the entire landscape of issues that the existence of such an institution would raise.

In the first place, there is the question of how well a juridical space – still partially public, and limited to the protection of specific properties – will work, in a general context in which prosecution is almost exclusively reserved by individual member states. Would a criminal action really be a European one were it acknowledged only in some member states' jurisdictions but not all?

The EPPO is in fact a partial solution to the fragmentation of the European criminal prosecution space. The lack of membership confines the EPPO to a scope of lateral cooperation, and avoids the objective of placing it into vertical integration. In particular, the objective of creating a single judicial area, which the July 2013 proposed regulations attempted to codify – the explicit expression "single legal area", which indicates the area within which the European Public Prosecutor is to exercise his or her powers, is found in article 25.1 – has not yet been achieved; for this reason the reference to the single legal area is not found in the EPPO Regulation.

This is one of the main contraindications arising from this institution in the absence of unanimity, not only with regard to the uniform application of EU law, but also regarding the effective and equivalent protection of the financial interests of the EU, with descending degrees of levels of prosecution of these crimes in participating, and non-participating countries (which has, in fact, constituted one of the main reasons to make the establishment of the EPPO necessary). The question is therefore how to protect the general good, which belongs not to a single nation but to the much larger community of all EU citizens, including those whose governments have chosen not to participate in the establishment of the EPPO[8].

This raises a further question: namely how to remedy the difficulty that a European Public Prosecutor will encounter in monitoring illegal activity carried out to the detriment of the EU's general finances, and how to allow him or her to have an overall vision of this phenomenon. The process of combatting matters under its jurisdiction will probably only be accelerated in the states that participate in enhanced cooperation, due to the specialization and focus of the EPPO in the prosecution of such crimes.

However, it will be necessary to verify whether the current untimely delay in the prosecution of such offenses will generally improve, thanks also to the "driving force" of the new body.

Furthermore, due to the lack of implementation of the aforementioned "single legal area", recourse to the mutual recognition of judicial measures and decisions remains the cornerstone of the system of cooperation[9]. Will the obligations set out in articles 325 and 327 of the TFEU be able to be fulfilled[10] incumbent on the non-participating states (hereinafter referred to as "out" states") to activate mutual solidarity with participating states in the fight against cross-border and organized crime, and thus remedy any delays caused by recourse to mutual recognition? Will all of this enable the EPPO to achieve its objectives of efficiency and effectiveness in the prosecution of crimes under its jurisdiction? The institution of the EPPO through enhanced cooperation will therefore be a testing ground for the principle of mutual recognition[11], which, it is hoped, will be supported by the sharing of the same principles, values and commitments by the 'out' states, and will be facilitated by the stipulation of labour agreements between them and the new European body[12]. Indeed, these agreements will certainly have to achieve mutual recognition of judicial decisions on the basis of relations between both participating, and 'out' states.

Issues relating to the establishment of the EPPO regarding penal action through enhanced cooperation are still particularly tricky: consider cases involving both participating and 'out' states, in which the criteria regarding the choice of jurisdiction established by the EPPO Regulation could lead to the jurisdiction of an 'out' state. In fact, in these situations the European prosecuting body would be unable to bring a case before the judicial authorities of that country, nor could it do so elsewhere according article 6.1 of the European Convention on Human Rights (ECHR) and article 47.2 of the Charter of Fundamental Rights of the European Union. However, if the competent prosecuting bodies of 'out' states decide not to pursue the constituting offense under PIF, in addition to the minimising of the EPPO's efforts in terms of collecting information, evidence and investigation and the ineffectiveness of suppressive action, a breach of the principle of equality within the European Union could also be established. In fact, similar conduct could be prosecuted by the EPPO if committed in participating states or by nationals of such states, while they could go unpunished if crimes were committed in states that were not participating in the enhanced cooperation[13]. It follows that these circumstances be regulated in agreements between the EPPO and non-participating states.

Taking into account the main objective of creating the EPPO, which is to protect the EU budget, of no lesser importance is the question concerning the ability of this office to recover more public money than is required to set it up and keep it running: there is also a risk is that it would be more expensive and bureaucratic than efficient[14].

3. The powers and actual functioning of the EPPO established through enhanced cooperation

The competence of the EPPO is limited to identifying, prosecuting and bringing to justice the perpetrators of offenses that harm the financial interests of the Union as per Directive (EU) 2017/1371 – as implemented by national law – and those that are inextricably linked to such offenses, provided that they have been committed in whole or in part in the territory of one or more participating member states, or by one of their nationals, or a person who at the time of the offense was subject to the statute or applicable regime of the competent member state[15].

Regarding the way in which information is acquired, all institutions, bodies and organs of the EU, and the national authorities of the participating member states, are obliged to inform the European Public Prosecutor immediately of any conduct which may constitute a crime within its remit. It remains to be seen whether and how, with regard to the national authorities of non-participating member states, the above obligation to inform will be expected in agreements concluded with the EPPO – perhaps together with the possibility of contacting the European Anti-Fraud Office (OLAF) and/or European Union's Judicial Cooperation Unit(Eurojust) to assist – and if such expectation will be able to guarantee the desired result.

With regard to investigative measures, in participating states the EPPO may make arrangements for local searches and seizures, acquisitions of objects, data and documents relevant to the crime, preventative seizures of proceeds and instruments of crime, interception of electronic communications devices of which the suspect is a recipient or sender, and as the tracking of objects by technical means. It should be noted that some investigative measures referred to in Article 30 of the Rules may be subject to accordance with national law. Likewise, the European Public Prosecutor may order precautionary measures on an individual, including via the instrument of the European Arrest Warrant (EAW).

Problems could arise regarding the conduct of the investigation in cross-border cases, if investigative measures are to be carried out in a member state other than the one in which the investigation was launched, and one that is not participating in the enhanced cooperation. In fact, in such cases the European Public Prosecutor that initiated the investigations will not be able to rely on the collaboration of his or her counterpart from the place where the investigative measure is to be carried out, since the counterpart will not exist. A test of this case can be obtained by using existing methods, in particular using instruments for the mutual recognition of judicial decisions of another member state, taking advantage of the supranational coordination of criminal investigations conducted by Eurojust, or, alternatively the submission of letters rogatory in the various member states concerned, possibly with the assistance of the European Judicial Network (EJN). However, with respect to the status quo, the situation will be improved by the fact that these situations will (hopefully) be specifically described and regulated in detail in the agreements (pursuant to article 99 of the EPPO Regulation) between the European Public Prosecutor and non-participating states. Moreover, as Eurojust is the EPPO's preferred interlocutor, the

linking and coordination between these two European bodies will prove to be much smoother than a situation in which two national authorities have to turn to Eurojust. Once evidence has been collected in the 'out' states, concentrating investigations into fraud by a European criminal investigatory body will result in the ability to circulate it around the other participating states, together with the possibility of the EPPO using it in related cases that fall within its competence; the leap in quality in this sense is evident.

With reference to prosecution, referral to trial, and related powers (in particular the power to formulate an indictment, participate in the taking of evidence, and exercise any available legal remedies) may be exercised by the EPPO, as long as they are competent *ratione personae* or *loci* before the jurisdictional authorities of the participating states.

It will therefore have the advantage that connected criminal investigations (or those relating to a single historical fact) to be carried out in participating member states, will be conducted by a single office, rather than comprising separate proceedings, with a full view of the facts and the power to carry out a criminal prosecution in a single national jurisdiction against all defendants.

4. Legislative or regulatory changes to be introduced in participating member countries

Another crucial issue that concerns the establishment of the EPPO through enhanced cooperation – which is in fact the subject of this International Conference – are changes to the regulatory system to be introduced in the participating countries in order to ensure consistent application of the EPPO Regulation and, consequently, its degree of feasibility. In fact, although regulation for ontological status (see article 288 of the TFEU) is applicable and effective in participating member states without the need for transposition measures, this does not mean that national legislators do not need to act on their penal code, criminal procedures, and judiciary, to allow harmonious integration of the new tool in the EU's legal system[16].

Realistically, the feasibility of the system as a whole will not be easy, due to the unequal application of the regulation and the different operations of public prosecutors in the territories of member states. In fact, it requires a series of normative, regulatory and organizational actions in all participating states[17] and reaching agreements with the 'out' states. It thus follows that the impact on the legal systems of participating states will be medium-high. Moreover references to national law in the EPPO Regulation are not infrequent, mostly about implementation of the European directives: first of all we must consider the material competence of the office of public prosecutor and the procedural rules applicable to it. On one hand the reference to national law undoubtedly represents a potential obstacle to the operations of the EPPO; on the other, establishing the same thing in the internal legal systems of the participating states will have less of an impact.

5. Head prosecutor and the European Delegated Prosecutors within the structure of the Italian national prosecution service

The legal status of the European Chief Prosecutor, in the case that he or she were to be Italian, and the European Public Prosecutor would be that of a "temporary agent" of the EPPO[18], at the same level as other EU officials. They would thus be placed outside the role of the Italian judiciary in the sense of judicial order, consistent with the fact that they would assume a "European" statute characterized by independence[19]. However, even though they would be located outside the role, they would not be assigned to functions other than judicial ones, albeit at a different level from the national level[20].

With regard to the status of the European Delegated Prosecutors (EDP), the literal tenor of article 17 of the Regulation allows their appointment even among persons previously unrelated to the judiciary, on the condition that their "independence shall be beyond doubt", they "possess the necessary qualifications and relevant practical experience of their national legal system" and establishes that "from the time of their appointment as European Delegated Prosecutors until dismissal" they should "be active members of the public prosecution service or judiciary of the respective Member States which nominated them"[21]. However, the appointment of persons unrelated to the judiciary - to whom the "the same powers as national prosecutors in respect of investigations, prosecutions and bringing cases to judgment"[22], in addition to those specifically assigned to them by the regulation - appears to be present an incompatibility with article 106 of the Italian Constitution, which provides that the appointments of magistrates take place by public competition[23]. Therefore, under penalty of violation of the aforementioned constitutional provision, only magistrates already in service in the ordinary judiciary may be designated as EDPs.

For EPDs to exercise their functions in proceedings under their jurisdiction will require a modification of article 51 of the Italian Code of Criminal Procedure (c.p.p.) and article 70 of the judicial system[24], which regulates the functions of the public prosecutor. The new paragraph of c.p.p. article 51 should state that, when dealing with proceedings for crimes identified pursuant to article 22 of Regulation (EU) 2017/1939, in preliminary investigations and in proceedings of first instance the functions of the Public Prosecutor are assigned to the EPDs identified by the public prosecutor's office of the district court in the district where the competent judge is based[25].

Furthermore, the definitive number – and functional and territorial allocation – of competences among delegated European prosecutors will be approved by the European Chief Prosecutor after having consulted and reached an agreement on the matter with the "competent authorities" of the participating states[26]; in the case of Italy most likely the CSM (Consiglio superiore della magistratura - High Council of the Judiciary) in concert with the Ministry of Justice. The actual identification – after establishing

appropriate selection criteria – of the means of coverage of the new "tabular" EPD posts, to be introduced with prosecutorial power, could prove more difficult, particularly taking into account the number and location of criminal proceedings concerning fraud against the EU's finances[27].

Another profile that will require the introduction of a specific regulation in the Italian legal system is the designation of the three candidates who will have to compete in the "Italian" post of European Public Prosecutor.

6. Legislative or regulatory changes required to implement the PIF Directive in Italian law

As stated, the regulation establishing the EPPO through enhanced cooperation does not define the crimes that come under the remit of the office, but refers to the national law to implement Directive (EU) 2017/1371 – which establishes minimum standards for the definition of criminal offenses and sanctions in the fight against fraud and other illegal activities affecting the financial interests of the EU – on the basis of the need for EPPO to prosecute offenders before national courts. “Its jurisdiction is defined by reference to the criminal law of the Member States, which classifies as crimes those acts or omissions which harm the financial interests of the Union, and defines the sanctions that may be imposed under the relevant legislation of the Union in the regulations of national jurisdiction”[28].

Over and above the 1995 PIF Convention, Directive (EU) 2017/1371 expands the list of crimes that attack the integrity of the EU budget[29], and appropriately introduces a binding prescription discipline[30] and provides minimum penalties for the perpetrators of serious crimes, as well as those who collaborate in, instigate or abet with them. Of great importance is the inclusion of binding legislation on related crimes, and the obligation for participating states to ensure the definition of legal entities under whose jurisdiction crimes defined in the PIF may be prosecuted[31].

In assessing whether it is necessary to make changes to Italian criminal law in order to adapt it to the PIF Directive within the deadline of July 5th, 2019, it is noted that the provisions contained in the Italian penal code already comply with its provisions in terms of offenses and related sanctions. In particular, the conduct constituting a crime within the meaning of the Directive – that is to say, fraud affecting the financial interests of the EU, the laundering of proceeds of crime, active and passive corruption and embezzlement – correspond, respectively, to the offences of aggravated fraud for the obtainment of public disbursements (Article 640-bis of the Italian Penal Code), of embezzlement to the detriment of the State or European Community (Article 316-bis of the Penal Code), of money laundering and use of money, goods or benefits of illicit origin (Article 648-bis and 648-ter of the Penal Code), of embezzlement (article 314-bis), of abuse of office (article 323 of the Penal Code), of embezzlement (article 646 of the Penal Code) and of the various types of corruption and undue inducement to articles 318, 319, 320, 322 and 322-bis of the Penal Code, crimes which all carry a maximum sentence of more than four years, in

accordance with the provisions of art 7. 3 of the PIF Directive. The same applies to the two types of fraudulent declaration provided for in articles 2 and 3 of Italian Legislative Decree 74/2000 (respectively, "fraudulent declaration through the use of invoices or other documents for non-existent transactions" and "fraudulent declaration by artifice"), due to the definition of tax fraud[32], which provides for a maximum six-year sentence[33]. Furthermore, with reference to the provision contained in the Directive, which states that "Member States shall take the necessary measures to ensure that the instigation, aiding, abetting and attempt are punishable as criminal offences"[34] in the commission of the crimes contemplated here, the Italian order is already compliant by virtue of the discipline referred to in article 322 of the Italian Penal Code (which punishes the instigation of corruption), article 56 (which regulates trials and is applicable to all crimes) and article 110 and those that follow, containing the punishment and trial of the accused. However, pursuant to article 6 of legislative decree 74/2000, the tax crimes referred to in articles 2 and 3 of that decree are not punishable if only attempted. Whether or not this provision must be modified to make it compliant with the provisions of article 10 of the PIF Directive must therefore be considered.

Regarding the liability of legal persons for the offenses referred to in the PIF Directive committed "for their benefit" by "any person, acting either individually or as part of an organ of the legal person"[35], Italian Legislative Decree 231/2001, which governs the liability of entities for administrative offenses dependent on a crime, ensures the compliance of the Italian system with the Directive. Article 6 of the directive may provide an opportunity to introduce a specific provision regarding the liability of legal entities with regard to tax offenses (although possibly referring only to VAT fraud), consistent with the preventative approach of the organization and management models pursuant to Italian Legislative Decree 231/2001. This would be an opportunity for a natural evolution of the institution's crime prevention tools and, at the same time, for a holistic and rational review of the overall system of sanctions in the fiscal field[36].

With reference to the regulation of the prescription pursuant to Article 12 of the directive, no further regulatory changes are necessary to Italian Articles 157 ff., in addition to those already implemented in the reform of 2017[37]. The latter provided, *inter alia*, for the offenses referred to in Articles 318, 319, 319-ter, 319-quater, 320, 321, 322-bis and 640-bis of the Italian Penal Code; the increase in the time required to carry out criminal proceedings rendered it ahead of the directive not only in terms of the fairness and effectiveness of litigation, but also in terms of compliance with the terms, interruptions, and suspensions provided for therein[38].

7. External relations of the EPPO

7.1 Cooperation with non-participating states

The primary consequence of the use of enhanced cooperation is that states that do not participate in it are not bound by the EPPO. The latter urges the Commission to "submit proposals in order to ensure effective judicial cooperation in criminal matters between the EPPO and Member States of the European Union which do not participate in enhanced cooperation [. . .] fully respecting the Union acquis in this field as well as the duty of sincere cooperation in accordance with article 4(3) TEU"[39].

This raises a delicate question regarding the instruments to be used to "compel" non-participating states to adopt deterrent measures against fraud and to ensure an effective level of protection of the EU financial interests, in compliance with article 325 of the TFEU. In fact, with doubts that the rule in question constitutes a deterrent in itself, and given that the EU is best placed to protect its financial interests (even by prosecuting the offenses that harm them), the 'out' states will have to take all necessary steps to ensure effective protection, but also to demonstrate that it is done in practice. This is what TFEU article 325 requires from a legal point of view, and this is what all Member States should already be doing. However, as is known, this result is not guaranteed. Therefore, if the 'out' states were not to adopt further and more effective measures, there would be no improvement in the status quo in these states[40]. Without a doubt, the stipulation of working agreements with the EPPO (pursuant to article 99 of the EPPO Regulation) in order to regulate the instrumental issues for their proper and effective functioning would be one of those "measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests" pursuant to article 325 of the TFEU. Moreover, in this particular sector, characterized by the cross-border dimension to crimes and the protection of the European public asset, the "negative obligation" referred to in article 327 of the TFEU should be interpreted positively and read in conjunction with the specific provisions set down by article 325 of the TFEU. In which case non-participating states must neither limit themselves nor hinder the work of the EPPO, but act in accordance with the principle of loyal cooperation pursuant to article 4.3 of the TEU, and are called upon to coordinate and collaborate with it, thus allowing it to carry out its tasks in the best possible way and to fulfil its mission. In this context, the importance of the aforementioned technical/operational agreements needs to be reiterated: they should have as their object the legal status and operational conditions of the European Public Prosecutor in these states, collaboration, exchange of information, and cooperation, together with the possibility of designating contact points in the 'out' states in order to facilitate the EPPO – and coordination between the EPPO action and that of the competent authorities in the territory of those states. These contact points will prove extremely useful for the purpose of cooperation and coordination of EPPO action with that of non-participating member states' powers of prosecution: they would be referents to whom national authorities could address doubtful cases or requests for assistance; true points of reference for the EPPO in the territory of those 'out' states that may eventually consent to such an institution. It is also desirable that they regulate the recognition and

enforcement of reciprocal sentences in non-participating states. The scope of these agreements, however, will largely depend on the willingness of the 'out' states to collaborate with the EPPO, and their awareness of the importance of protecting the EU's financial interests and, consequently, the role of the EPPO.

7. 2 Cooperation with the agencies and bodies of the EU

The EPPO Regulation includes the right - or, better, reveals an opportunity - for the prosecutor to conclude formal agreements containing operational details on the means of cooperation and exchange of information with other EU institutions and agencies to facilitate the exercise of its functions[41]. The conclusion of agreements with the other bodies and agencies of the EU by the EPPO did not neglect its competences in the original EC proposal[42], but due to the establishment of the power of prosecution through enhanced cooperation, such agreements will have to have additional content, reflecting the specific tasks these agencies will be required to perform. It follows from all of the above that the objectives of the agreements in question are to define, improve and encourage cooperation between EU bodies and agencies (based on the principles of transparency, reciprocity of tasks, and coordination of efforts), in order to achieve synergy at a high level and to allow the creation of a coherent system of investigation and prosecution for offences that harm the financial interests of the EU. These agreements should be capable of overcoming any problems linked to the establishment of the EPPO through the use of enhanced cooperation.

Relationship with Eurojust

In accordance with the provisions of TFEU article 86 (the EC "may establish a EPPO from Eurojust"), Regulation (EU) 2017/1939 establishes close relations between the EPPO and Eurojust, based on mutual cooperation. Since the EPPO is established through enhanced cooperation, Eurojust will continue to fulfil its task of supporting and strengthening coordination and cooperation between national authorities in the fight against serious forms of transnational crime that affect the European Union, as a "necessary facilitator and interface for various national judicial authorities"[43]; however its main interlocutor will be the EPPO, which will represent a point of reference for the coordination of the action between the latter and public prosecutors in non-participating states. Eurojust will therefore be called upon to coordinate investigations for transnational crimes involving 'out' states and/or third-party states (in particular those with which they have concluded a cooperation agreement), to support the national authorities of non-participating states when investigating and prosecuting crimes that harm the EU's financial interests; and promote the exchange of information[44], in addition to the direction of shared investigations. The Regulation specifies in this regard that "Whenever the EPPO is requesting such

cooperation of Eurojust, the EPPO should liaise with the Eurojust national member of the handling European Delegated Prosecutor's Member State"[45].

In accordance with the principle of *non bis in idem*, the identification and prevention of possible conflicts of jurisdiction, and prevention of conflicting judgments will be of fundamental importance. This is in fact a concrete risk that could occur in the case of actions exercised by authorities of the 'out' states and the prosecutor's office. This will of course need to be set into the agreements with non-participating member states. However, there may also be situations that lack coordination in which Eurojust's action may prove crucial.

The aforementioned tasks that Eurojust will be called upon to perform must be reflected in the agreements to be stipulated (per articles 99. 3 and 100 of the Regulation) between the EPPO and Eurojust. The subject of this agreement should be, in particular, the discipline of specific tasks to support the transmission and enforcement of judgments or requests for judicial assistance in the 'out' states and the activities of assistance to the European Public Prosecutor in the management of relations with the authorities of those states, the discipline of technical support and services that Eurojust provides to the EPPO, of the exchange of information, expertise and best practices between the two EU bodies. Furthermore, it would be desirable for the same instrument to regulate the manner in which Eurojust will fulfil its task of settling the positive and negative conflicts of competence between the European Public Prosecutor and the prosecuting authorities of the 'out' states about the initiation of an investigation or a criminal action.

Relationship with OLAF

Following the adoption of the EPPO Regulation through enhanced cooperation, OLAF will retain the power to carry out administrative investigations into fraud and illegal activities that are detrimental to the EU's financial interests. However, OLAF's recommendations, which are the principal results of its investigative activities, will no longer be addressed to the competent national judicial authorities of the states, but will instead be communicated directly to the EPPO (at least when they concern criminal violations committed in States participating in enhanced cooperation). Indeed one of the reasons for the establishment of the EPPO was the heterogeneous treatment of OLAF's recommendations by EU member states[46].

OLAF, together with Eurojust, will be required to "actively support the investigations and prosecutions of the EPPO, as well as cooperate with it, from the moment a suspected offence is reported to the EPPO until the moment it determines whether to prosecute or otherwise dispose of the case."[47]

As set out in the preamble to the Regulation, "Cooperation with Europol and OLAF should be of particular importance to avoid duplication and enable the EPPO to obtain the relevant information in their possession, as well as to draw on their analysis in specific investigations."[48] An agreement between EPPO and OLAF will therefore be the most necessary and appropriate instrument to regulate both "close

cooperation aimed at ensuring the complementarity of their respective mandates, and avoiding duplication"[49], and the activity of OLAF involving cases that occur in 'out' states, a fundamental activity to enable the latter to better cooperate with the EPPO, and thus to respect the obligation imposed by article 325 TFEU[50]. The greatest risk would be that two investigations –civil and criminal –are conducted on the same case, which would result in duplication of costs and unnecessary expenditure of energy. This agreement will also be entrusted with the task of regulating the exchange and transmission of information and evidence held by OLAF[51] and its recommendations to the EPPO where they concern criminal violations committed in states that are participating in enhanced cooperation, as well as taking advantage of its expertise. In this way, the European Public Prosecutor will have at his or her disposal a formidable set of tools to assist the investigations, many of which are currently overlooked and underutilised by national investigating authorities.

Relationship with Europol

Regarding the relationship between the EPPO and Europol, article 86.2 of the TFEU also identifies the importance of the link between the two bodies in question for the purpose of performing the tasks by the EPPO. Furthermore, article 102 of the EPPO Regulation talks about "a close relationship with Europol", based on the latter's support for the investigations and prosecutions of the EPPO. This is based principally on the provision of information by Europol to the EPPO concerning crimes falling within its investigative competence, and the EPPO may also ask Europol to provide analytical support to the greatest extent possible, in particular when the investigations concern 'out' states. The content of the working agreement pursuant to article 102.1 of the Regulation will therefore have to reflect the aforementioned additional role.

It remains to be seen whether in practice the agreements that the European Public Prosecutor stipulate through enhanced cooperation with partners (Eurojust, OLAF and Europol) will avoid overlaps and therefore a consequent waste of resources, in order to allow them to better exercise their powers and competences and to obtain the collaboration, where necessary, of the judicial authorities of the 'out' states, in order to limit to a minimum the disadvantages that such an established method undoubtedly entails.

Moreover, only once the EPPO is operational, will it be possible to say whether the choice of the European legislator to maintain (and pay for) four European bodies that concern themselves with criminal matters will be worthwhile. Doubts are currently rising: is there not a need to reorganise of European institutions with a view to greater rationalization?[52]

Conclusions

Individual agreements between the EPPO, non-participating states and EU agencies are entrusted with the task of maximizing the effects of their collaboration, given current conditions. For all these commitments, there will be the requirement for a global and long-term perspective, in which the fight against criminality, and the suppression of crimes that harm the EU's financial interests, is the main priority.

Ultimately, although this reinforced cooperation is susceptible to criticism and confusion, the existence of a supranational investigative body with autonomous investigative powers will contribute to there affirming a common sense of justice that is crucial for the future consolidation of a "European" identity. Although common to only a few member states, the EPPO will produce politically novel and challenging scenarios, and will give a new dimension to the specific issue of protecting the EU budget from damage resulting from criminal activity[53], helping to reinforce the idea of the need for a unitary European prosecution body with a view to moving from mere cooperation in criminal matters towards genuine European integration.

The doctrine has already provided answers to some of the questions posed here; nevertheless they and others will be the subject of debate during the international conference on May 24-25, 2018.

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[1]The first use of this acronym, which stands for the "protection of the Union's financial interests", is found in the Convention on the Protection of the European Communities' Financial Interests adopted on 26 July 1995 (which entered into force on 17 October 2002) to promote and to facilitate judicial cooperation between the authorities of EU states, since fraud in the EU is often transnational in nature. Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law entered into force (pursuant to Article 19) on the twentieth day after its publication in the Official Journal of the EU (OJ L 198, 28 July 2017, p 29 and following). The process began on 12 July 2012 with Proposal for a Directive of The European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law, COM/2012/0363.

[2]Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the EPPO ('the EPPO'), published in the Official Journal of the European Union L 283 on 31 October 2017 and subsequently entered into force on November 20, 2017.

[3]Article 120 of Regulation (EU) 2017/1939.

[4]Proposal for a Council regulation on the establishment of the EPPO, 17 July 2013, COM (2013) 534, Preliminary Report, p. 2 point 1 and p. 4, point 3. 2.

[5] See Fidelbo M., Enhanced cooperation as a way of establishing the EPPO, future scenarios in a debate that is still evolving, published in the Quarterly Review of Contemporary Criminal Law n. 3/2016, p. 96 and ss.

[6] For an analysis of the arguments in favour of the establishment of the EPPO through enhanced cooperation, see Fidelbo M., op. cit. , p. 99 and ff. For a discussion of the objectives of the Commission, refer instead to the above Proposal for a Council regulation on the establishment of the EPPO, COM (2013) 534, Preliminary Report, p. 5, point 3. 3.

[7] See Fidelbo, M. op. cit. , p. 97.

[8] Idem, p. 99.

[9] Ibid.

[10] Referring, respectively, to the obligation to take deterrent measures against fraud and ensuring a level of protection of EU financial interests that is effective, and to the obligation not to hinder the implementation of enhanced cooperation.

[11] Fidelbo M., op. cit. p. 102.

[12] See article 99 of Regulation (EU) 2017/1939.

[13] Fidelbo M., op. cit. p. 104.

[14] Roccatagliata, L. The EU Council Definitively Approves the Founding Regulation of the EPPO: EPPO is finally a reality, in Penal Web Jurisprudence, 2017, 10, p. 3.

[15] See preamble 11 and Articles 22 and 23 of Regulation (EU) 2017/1939.

[16] Salazaar L. The EPPO is finally a reality: what's next . . . ? , Eurojus. it, 20 November 2017, paragraph 5.

[17] With reference to the adaptations necessary to make the discipline of appeals required by the EPPO Regulation compatible with the division of powers between public prosecutors of District Authorities and magistrates of the General Prosecutors at the Court of Appeal and the Court of Cassation, see Salazaar L., op. cit. , paragraph 8.

[18] Article 96 of Regulation (EU) 2017/1939.

[19] Article 6 of Regulation (EU) 2017/1939.

[20] See Salazaar L., The EPPO is finally a reality: what's next . . . ? , op. cit. paragraph 5.

[21] Article 17 and preamble 46 of Regulation (EU) 2017/1939.

[22] Article 13 of Regulation (EU) 2017/1939.

[23] See Salazaar L., op. cit. , paragraph 7.

[24] Italian "Royal" decree, January 30, 1941, no. 12 as amended by article 20 of the Presidential Decree of 22 September 1988, no. 449.

[25] Salazaar L., op. cit. , paragraph 7.

[26] Preamble no. 40 and article 13 of Regulation (EU) 2017/1939.

[27] Salazaar L., op. cit. , paragraph 9.

[28] Preamble no. 63 and article 4 of Regulation (EU) 2017/1939.

[29] The PIF Directive also provides, in addition to the three offenses already mentioned in the Convention (fraud, corruption and money laundering), "related offenses", such as that of active and passive corruption (article 4. 2), that of embezzlement (also including the Italian "abuse of office" and the misappropriation of European funds per article 4. 3).

[30] Member States are obliged to include a prescription period of not less than five years from the commission of the "serious" crimes referred to in Articles 3, 4 and 5 of the directive (preamble 22 and article 12).

[31] Article 6 of the PIF Directive.

[32] According to point 1 of paragraph 7 of Italian Legislative Decree 74/2000, "fraudulent means" indicates both active and omissive conduct carried out in violation of a specific legal obligation, which creates a false representation of reality.

[33] The literature states that "Once applied to the penal-fiscal field, the notion of 'fraud detrimental to the financial interests of the Union' is likely to include not only the type of VAT fraud characterised by an actual knowing deceptive use of false documents, but also the idea of dishonest tax declaration, due to the presence of inaccurate or incomplete data. Moreover, the crime of omission, also included in the definition, appears to refer both to the omission tout court in how tax declarations are presented, and to the hypothesis of presenting a false tax declaration by omission. " See Bellacosa M. , The reform of tax crimes from a European perspective, in Del Vecchio A. and Severino P. (editors), Protection of investments, from market integration to competition of regulations, Bari, 2016 p. 343.

[34] Article 10 of the PIF Directive.

[35] Article 6 of the PIF Directive.

[36] See Bellacosa M. , The reform of tax crimes from a European perspective, *ibid.* pp. 370 and 371.

[37] Italian Law 103, 23 May 2017, article 1. See Salazaar L., *op. cit.* , paragraph 5 on the topic.

[38] Article 12 of the PIF Directive. Article. 17 paragraph 1-bis of Italian Legislative Decree 74/2000 establishes that for tax offences provided for by Articles 2 to 10 of the same decree: "Limitation periods (. . .) are increased by one third"; therefore, in the presence of acts of interruption - of which, in addition to acts indicated in article 160 of the Criminal Code, as well as to the recording of ascertainment or the act of ascertaining the related sanctions - the tax offences in question are set down according to the terms set out in articles 157 and ff. of the Italian penal code, increased by one third.

[39] Preamble 110 of Regulation (EU) 2017/1939.

[40] The Commission and each of the Member States could therefore refer the matter to the Court of Justice pursuant to Articles 258 and 259 of the Lisbon Treaty so that the latter can evaluate the possible non-compliance to its obligations under the treaties by the "out" state in question. This appeal could constitute - together with the same provisions of in article 25 of the Lisbon Treaty - an instrument of deterrence for compliance with the obligations imposed by the latter provision.

[41] Recital 100 and articles 99 ff. of Regulation (EU) 2017/1939.

[42] See article 57 of the proposal for a Council regulation establishing the EPPO, on 17 July 2013, COM (2013) 534, and article 41 proposing a regulation establishing the agency of the European Union for judicial cooperation in criminal matters - Eurojust COM (2013) 535, 17 July 2013.

[43] Spiccia F. Supranational judicial coordination: problems and perspectives in the light of the Council Decision 2009/426/GAI to reinforce the powers of Eurojust, in the Court of Cassation, no. 5/2010, p. 274, <http://www.csm.it/Eurojust/CD/28.pdf>

[44] Undoubtedly, sharing information is the starting point for an effective and timely joint law enforcement action.

[45] See recital 102 of Regulation (EU) 2017/1939.

[46] Indeed, as is well known, all remedial measures necessary to follow up the results of OLAF investigations reporting financial responsibility fall to the responsibility of the competent authorities.

[47] Recital 69 of Regulation (EU) 2017/1939.

[48] Recital 100 of Regulation (EU) 2017/1939.

[49] Recital 103 of Regulation (EU) 2017/1939.

[50] Consider, for example, acts prejudicial to the financial interests made in non-participating states in which the authorities are aware: these authorities could use OLAF to start proceedings to report them to the European Public Prosecutor.

[51] This is the added value of OLAF, which holds information at the European and/or international level, about which national authorities are often not aware.

[52] Roccatagliata L., *op. cit.* , p. 3.

[53] See Fidelbo M., *op. cit.* , p. 125.